91-1608

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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION

for Writ of Certiorari

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Questions presented for review

(1) The Fifth Circuit Court of Appeals in this case did not declare clearly erroneous the district court's "ultimate" fact findings the Austin Outer Loop is a proposal for major federal action, but it nonetheless found to the contrary and, then, rendered judgment. May an appellate court do this, consistently with Rule 52(a) and consistently with this Court's teachings in Pullman-Standard v. Swint, Anderson v. City of Bessemer City, and Icicle Seafoods v. Worthington?

(2) A Federal Highway Administration regulation promulgated pursuant to the National Environmental Policy Act (NEPA) prohibits prospective applicants for federal funding of a proposed project from proceeding to develop with private funds an integral part of the project prior to completion of the NEPA process. May a district court enforce this prohibition in the absence of significant historical federal control of the project?

(3) If the distinction, for purposes of invoking NEPA safeguards, between projects that are "proposed" and those that are merely "contemplated" is guided by the application of a legal standard, what is that legal standard?

Notation of corporate status: No Petitioner is a subsidiary or parent of another corporation.

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Reference to district court and appellate court opinions

The district court opinion in this case is an unreported memorandum opinion from the Western District of Texas, Austin Division. It was entered March 6, 1990 and was amended April 5, 1990. It is reproduced at pages 35 through 68 of the Appendix to this Petition.

The appellate court opinion is from the Fifth Circuit Court of Appeals and is reported at 950 F.2d 1129 (5th Cir. 1992). It is reproduced at pages 1 through 33 of the Appendix to this Petition.

Concise statement of the jurisdictional grounds

The judgment sought to be reviewed is the Fifth Circuit's judgment entered on January 17, 1992, contemporaneously with the opinion referenced above. Both panel and *en banc* rehearing were denied February 24, 1992; the order of denial is reproduced at pages 69 and 70 of the Appendix to this Petition. Jurisdiction in this Court is pursuant to 28 U.S.C. § 1254(1).

Statutory and regulatory provisions germane to this case

1. Rule 52(a), Fed. R. Civ. Proc. (1991)

RULE 52. Findings by the court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. * * *

2. 23 C.F.R. § 771.113 (1991) [The Federal Highway Administration's interpretation of this regulation is reproduced at pages 71 through 77 of the Appendix to this Petition.]

§ 771.113 Timing of Administration activities.

(a) The Administration in cooperation with the applicant will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying as defined in § 771.117(d)), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIs has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the FHWA Division Administrator has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR Part 450, Subpart B, and 23 CFR Park 630, Subpart A, have been met.

(b) For FHWA, the completion of the requirements set forth in paragraph (a)(1) and (a)(2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. However, such approval does not commit the Administration to approve any future grant request of fund the preferred alternative.

(c) Letters of Intent issued under the authority of section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

3. 42 U.S.C. § 4332(C) (1991)

§ 4322. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts [NEPA § 102]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

A concise statement of the case

This is a suit to enforce the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1991) and Federal Highway Administration (FHWA) regulations promulgated pursuant to NEPA. 23 C.F.R. § 771.113 (1991). The crux of the case on the merits is the authority of the judiciary to prevent non-federal actors from compromising the NEPA process prior to the time at which an Environmental Impact Statement (EIS) must be completed.

The Petitioners are local environmental and urban planning groups. One of the Respondents is the Texas Department of Transportation.[1] One is FHWA. The third is a landowner's corporation that is an agent for the state highway department. The dispute involves two large freeways, the Austin Outer Loop and MoPac South, that will traverse and intersect over a small and shallow drinking water aquifer on the southwest fringe of Austin, Texas. (A map of the relevant area is at App. 63.)

By the summer of 1989, NEPA environmental assessments had been prepared on the Loop and on MoPac South, FHWA (the federal Respondent) had published and not retracted a Federal Register Notice of Intent to prepare NEPA environmental impact statements covering the entire Loop, 7/8s of the Loop was in fact in the NEPA draft EIS process, various representations had been made to the public by the state and federal highway officials to the effect the Austin Outer Loop would be federally-financed and/or supervised, state highway officials had repeatedly made

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1 This Respondent is referred to in the district court opinion as "SDHPT" and in the appellate opinion, as "TDH." It is often referred to in this Petition as "the state."

similar representations to local governmental officials, and a substantial portion of the Loop was in Section 7 (i.e., federal project) Endangered Species Act[2] consultation.

Nonetheless, the state highway department and the landowners' corporation undertook to construct Segment 3 of the Austin Outer Loop (the aquifer-crossing segment) and MoPac South without federal funding and without preparing NEPA environmental impact statements that covered them.[3] Petitioners sued to halt some of the ongoing MoPac South construction and to prevent the start of Segment 3 construction. District court jurisdiction was invoked pursuant to 28 U.S.C. § 1331(a) (1991).

Judge Walter S. Smith, Jr., was the trial judge. The case was pending before him somewhat more than nine months, and was the object of a day's preliminary injunction hearing and of several extensive partial summary judgment motions. The record, exclusive of testimony transcriptions and trial exhibits, was approximately 2500 pages at the time of judgment.

Judge Smith, sitting without a jury in Waco,[4] took three days' testimony and thousands of pages of documentary

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2 16 U.S.C. § 1536 (1991).

3 They did prepare state "EIS"s on MoPac South and, ultimately, on Segment 3. Texas at the time had no statutory or regulatory law providing for environmental review of state projects. The Petitioners alleged the inconspicuous switch to *ad hoc* state procedures was deceptive conduct, while the state and private Respondents (at least) alleged the invoking of state environmental review procedures should have alerted Petitioners to sue sooner, if they were going to sue at all.

4 Waco is 100 miles north of Austin.

evidence at the trial on the merits. In March 1990, he ruled, in the main, for Petitioners. Specifically, he found:

> [T]he Court is of the opinion that the Austin Outer Loop is a 'proposal for major federal action' subject of an environmental document, and further that Segment 3 cannot be 'segmented' from the overall proposal and funded separately before the environmental process pursuant to NEPA on the entire loop is completed.

App. 50. He further found MoPac South was subject to NEPA, because the southern half of MoPac South had been developed simultaneously with Segment 3 of the Austin Outer Loop, and because MoPac South was an extension of a federal project, was a connector of three federal projects and lacked substantial independent utility. App. 51 and 67. He issued an injunction prohibiting further project development activities on Segment 3 and on a portion of Mopac South pending completion of the NEPA process on the Loop and a portion of MoPac South. App. 61 - 62 . He did not order an EIS be prepared on roadway.

The principal legal bases for Judge Smith's opinion were Hawthorn Environmental Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D. Ga. 1976), aff'd *per curiam*, 551 F.2d 1055, 1056 (5th Cir.1977) (high likelihood of future federal funding justifies NEPA application to highway project even in the absence of a pending federal funding request) and the Federal Highway Administration's

interpretation of its NEPA regulations.[5]

The Respondents appealed to the Fifth Circuit. Then-Chief Judge Clark and Judges Barksdale and Williams reversed and rendered for Respondents in a lengthy per curiam opinion. App. 1 - 33. The appellate court made numerous fact findings, about which Petitioners complain, *infra.* It found the Austin Outer Loop is only "contemplated," rather than "proposed," and is not, in any event, "federal" [App. 18]; it found neither Segment 3 nor any portion of MoPac South is an integral part of the Loop [App. 20]; and it found Segment 3 and MoPac South have independent utility and other characteristics related to segmentation analyses. [App. 29 - 30].

The legal doctrine guiding the appellate court's distinction between "proposed" and "contemplated" actions was not explicitly stated, and the examples of basic facts (see, note 11) the appellate court found to foreclose "proposal" status for the Loop [App. 18] are of the sort common to most large projects. On the "federal" action issue, however, it is pretty clear the appellate court did not believe prospective federal control of a project, however thoroughly established,

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[5] The entire interpretation of the most relevant regulation, 23 C.F.R. § 771.113, is reproduced at App. 71-77. It provides, in small part (emphasis added):

> It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant . If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed.

can support the application of NEPA constraints to privately-funded activities.

The appellate court cited numerous cases, but the most frequently-cited ones were Macht v. Skinner, 916 F.2d 13 (D.C.Cir. 1990) (federal funding of preliminary design and environmental studies does not trigger NEPA application) and Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert.* denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991) (retaining eligibility for federal funding does not alone make a project "major federal action"). The appellate court did not address the FHWA regulation or the agency interpretation of it on which the district court had relied.

Because, in Petitioners' view, the appellate court overturned trial court fact findings in violation of Rule 52, Fed. R. Civ. Proc., and in violation of applicable Supreme Court precedent on appellate fact-finding (cited *infra*), and because the opinion would largely eviscerate NEPA for any sizeable project, Petitioners suggested an *en banc* rehearing, which was denied both as a request for panel rehearing and for *en banc* rehearing. App. 70. Petitioners' request that the appellate court stay its mandate pending this Court's decision on their *certiorari* petition was denied March 19, 1992.

Argument amplifying the reasons for allowance of the writ

The principal reasons the Court should grant *certiorari* are that the Fifth Circuit in this cause both usurped the fact-finding role our system rightly assigns to the trial court and it failed to exercise the primary responsibility of appellate courts: the enunciation or clarification of legal doctrine. The appellate court set aside -- without explaining

an appellate review standard by which it was doing so -- numerous district court fact findings that were not clearly erroneous. For one of its critical fact-findings (that the Austin Outer Loop is "contemplated," rather than "proposed"), it did not offer explicitly a rule of general applicability to guide future fact finders, and the basic facts it marshalled to support its finding imply a rule so unworkable as to invite disregard by future fact-finders.

Furthermore, *certiorari* review is justified because (1) the Fifth Circuit's "not a proposal" finding stretches one of this Court's NEPA cases [Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976)] to cover an extreme not intended by this Court, and because (2) a dispassionate reading of the appellate opinion compels the conclusion prospective federal control of a project is not relevant to protection (through restraint of state actors) of the impending or, even, on-going NEPA process. This latter position is not logical, and it cuts across the grain of CEQ and FHWA regulations and of a substantial body of NEPA caselaw.

The appellate function and respect for the clearly erroneous standard for appellate review of fact findings:

The Petitioners' criticism of the Fifth Circuit's extensive finding of facts and their criticism of its not enunciating doctrine go to the core of what is generally conceded to be the principal legitimate appellate function.

Judge Posner, of the Seventh Circuit, has in recent years been particularly assertive on the matter of the proper appellate function. In Mucha B. King, 792 F.2d 602, 605-606 (7th Cir. 1986), he strongly suggested the only legitimate appellate responsibility is the maintenance of uniformity and coherence in the law, and that, being the case, that rigid adherence to the Rule 52(a) "clearly erroneous" review

standard is essential to the proper exercise of appellate authority. Petitioners are not prepared to embrace wholeheartedly the absolute character of the position attributed to Judge Posner, but it would not seem open to legitimate dispute that maintenance of doctrinal uniformity is the primary appellate court responsibility.[6]

To the extent appellate review permits the finding anew of facts, appeals are encouraged, with the concomitant increase in costs to litigants and in burden on the appellate system and, probably, with the collateral effect of exacerbating public dissatisfaction with the slow pace of resolving disputes through the court system. Justice White, speaking for this court in Anderson v. City of Bessemer City, recently expressed most of this sentiment:

> "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has

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[6] The following summary of the reasons why maintenance of doctrinal uniformity is the primary or, even, sole justification for exercise of appellate authority has been largely articulately (recently) by Professor Evan Tseng Lee in *Principled Decisionmaking and the Proper Role of Federal Appellate Courts: the Mixed Questions Conflict*, 64 So. Cal. L. Rev. 235, 247-256 (1991) and (earlier) by Professor Charles Wright in *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L.Rev. 751 (1957).

> stated in a different context, the trial on the merits should be the 'main event' ... rather than a 'tryout on the road.'"

Anderson v. City of Bessemer City, 740 U.S. 564, 574-575, 105 S.Ct. 1504, 1512 (1985).

Petitioners are particularly sensitive to the Bessemer City passage about the burdens on parties of having to try the facts of their cases more than once. All parties to the case at bar compiled and put to Judge Smith reams of evidence laying out the basic facts. They did this "live" at the preliminary injunction hearing and, later, through various extensive partial summary judgment motions and, later still, "live" in three days of trial (a 100 miles from home) and in post-trial written arguments. Through these efforts, the parties acquainted Judge Smith with the basic facts and with their nuances. An understanding of the latter is essential to the accurate drawing of inferences to find ultimate facts, and the understanding is exceedingly hard to re-convey at the appellate level in 50 pages and 20 minutes per side.[7]

The Bessemer City concern about the diversion of judicial (appellate) resources is also particularly *apropos* to this case, in Petitioners' view. Expenditure of appellate effort on fact finding necessarily means there are fewer appellate resources for maintenance of doctrinal uniformity. Clarity and reasoning regarding generally applicable principles can not receive the attention they would, were appellate resources

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[7] Respondents will doubtless argue here, as they did in the court of appeals, that everything of moment was stipulated in this case via an un-accepted pretrial order. [See, footnote 3 to the opinion of the court of appeals, App. 4.] The stipulations are precisely worded and address only the most basic facts. The parties did not agree on many of the more inferential facts the stipulated facts might or might not support.

not also committed to finding facts.

The appellate opinion in this case is particularly lacking in clearly expressed or explained principles of general application. The heart of the opinion, its "major federal action" section [App. 9 - 21], must almost be outlined, if one is to keep straight findings and discussion germane the entire Loop, on the one hand, or only to Segment 3 of the Loop or to MoPac South, on the other hand; this section's segues between the "federal action" issue and the "proposal" issue and back to the "federal action" issue likewise do not contribute to clarity.

A point not mentioned in the Bessemer City opinion, but also supportive of strict adherence to the Rule 52(a) mandate, is that appellate court fact finding tends to undermine the legitimacy of governmental power. It loosens a perceived constraint on governmental (i.e., judicial) power[8], and it weakens the focus of today's appellate courts on their responsibilities to enunciate generally applicable principles that will in reality operate to constrain (i.e., be taken as precedent by) and, thus, help legitimize the power of future courts.

The finding the Loop is not yet "proposed":

Though the appellate court opinion itself frequently lapses into describing the Austin Outer Loop as "proposed,"[9] it clearly finds the Loop is, "in essence," only contemplated and conceptual [App. 18] and nonexistent except in

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8 Please see the Lee article (*Principled Decisionmaking . . .*), *supra*, particularly at 255, for discussion of the importance of constraints as means to legitimize governmental power.

9 See, for example, App. 2 (twice), App. 7, and App. 8.

"speculative plans for years ahead." App. 20 - 21. The district court had found otherwise. App. 50. The district court opinion noted the state had for the last three years been including the Loop in its submissions for the Austin area's Transportation Improvement Program[10] [App. 44], it noted the FHWA's characterization of the Loop as "proposed" in its Federal Register Notice of Intent[11] [App. 42], and it noted the FHWA's characterization of the Loop as "proposed" in a letter to the Audubon Society [App. 43].[12]

The appellate opinion does not explain why reliance on these basic facts to support a "proposal" finding would be clearly erroneous in the context of this case. Worse yet, the appellate opinion, at footnote 9, cited only a portion (without ellipses) of the "proposal" definition promulgated by the CEQ. The omitted portion of the CEQ definition is certainly germane on its face to cases of the type before the court (i.e., germane to cases where the agency disputes the existence of a

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10 This statement of transportation projects planned for implementation in the next at least three years and next two years is required by 23 C.F.R. § 450 (particularly, Subpart B) as part of the federal-aid transportation planning process; the district court had before it Plaintiffs' trial exhibits P-58 through P-60, which showed the Austin Outer Loop in the annual elements of those programs and scheduled for federal funding.

11 A Notice of Intent is required by CEQ regulation to describe the "proposed action" and alternatives. 40 C.F.R § 1508.22.

12 The district court opinion is supported by other evidence (e.g., the at least $4.25 million the state had spent on Loop engineering studies) before Judge Smith, but not explicitly acknowledged in the opinion. The "proposal" dispute, such as it was, at trial was as to whether there was one proposal (the Loop) or five proposals (segments as independent projects). App. 49.

proposal): "a proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. § 1508.23. The appellate opinion did not explain why this portion of the definition is suspect or how the district court erred in applying this definition.[13]

The appellate opinion makes fact findings on which it apparently bases its decision the Loop is not yet "proposed." App. 18. Most of these are not to be found in the district court opinion, and they are all exceedingly generic.[14] In any event, the making of these findings is in direct conflict with this Court's teaching just six years ago in Icicle Seafoods v. Worthington, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530 (1986), and ten years ago in Pullman-Standard v. Swint, 456 U.S. 273, 291-293, 102 S.Ct. 1781, 1791-1792 (1982) (where appellate court believes the district court misapprehends how an ultimate fact is defined at law, the appellate court should remand for relevant fact-findings).

The low likelihood the appellate court's guidance will constrain future jurists regarding when the "proposal" stage is at reached:

Petitioners earlier noted maintenance of doctrinal

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[13] The appellate opinion does state, "the District court incorrectly elevated FHWA's early coordination process to the status of a 'proposal' under NEPA." App. 15. Putting aside any disagreement about the accuracy of this statement, it is still not helpful to future jurists in the absence of elaboration on how a process might be a "proposal."

[14] For example, "major construction projects, like the Austin Outer Loop, customarily change in design, cost, scope, and impact over the years required for development."

uniformity is the dominant, some say the only, reason for appellate review. The appellate opinion in this case does not lay out principles conscientious future jurists will find credible for drawing the "contemplated" versus "proposed" distinction, and, therefore, fails to meet the standard on which this Court should insist.

The court of appeals's findings in support of its "contemplated action" inference are the only source (by implication) of a potential rule of general applicability. The rule to be drawn from the assumed relevance of the findings stated sweeps so broadly that it realistically will not be accorded precedential effect by future jurists, unless NEPA is to become "dead letter" law for most large projects. If it were honored as the doctrine by which projects may be excluded from NEPA coverage, complicated projects, projects to be built in phases and, indeed, projects for which some phases are not absolutely certain of construction would not be subject to NEPA. In most circumstances, the CEQ and FHWA regulations regarding the premature commitment of resources to projects would be meaningless,[15] and regulations providing for supplemental EISs, which are intended to accommodate the possibility of changed future conditions, would be rendered largely unnecessary.

The Fifth Circuit's unwarranted extension of Kleppe:

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15 Were the appellate opinion's implicit doctrine honored, consider the general lack of need for, for example, proscriptions against advance right-of-way purchase. The highway or transit project for which the purchase is intended might change in scope or design or financing or construction timing, etc., in the future, so it would not qualify (under the appellate court's implicit doctrine) as "proposed" for purposes of NEPA. Cf., National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976) and 23 C.F.R. § 771.113(a).

The appellate court's use of the terminology of Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976), lends stature to the appellate opinion, but it erodes the stature of Kleppe, because the opinion extends the Kleppe principle to an unreasonable reach.

Kleppe dealt with a demand by plaintiffs for preparation of a regional EIS covering federal permitting for numerous coal development activities in an area encompassing portions of four states. In Kleppe, the trial court "found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated." Kleppe, *supra*, at 427 U.S. 401, 96 S.Ct. 2726.

In the case at bar, the district court did not order an EIS (regional or otherwise) be prepared, so there is lacking in this case the rationale for the straight-forward statutory interpretation analysis this Court made in Kleppe. The "region" of the Austin Outer Loop is basically one county.[16] Most importantly, it was the fact finding by the jurist on the scene with the most exposure to the facts that the Loop is an integrated plan. Judge Smith found: "The Defendants have maintained throughout this litigation that the Austin Outer Loop was not conceived as one project nor were the segments being proposed, planned, designed, or constructed as one project. However, the evidence does not support this contention." App. 17. This is exactly opposite the trial court finding in Kleppe.

The appellate court's invocation of the Kleppe rubric in this case, which is factually so unlike Kleppe, confuses doctrine, rather than clarifies it, and should not be permitted.

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16 About three miles of the Loop dips into a second county.

The question of whether the Loop is "federal":

The appellate opinion finds the Austin Outer Loop is not "federal" for NEPA purposes, even if it were conceded the Loop is a proposal. App. 9 - 21; most directly at 21. The district court found otherwise. App. 49 - 50.

Again, Petitioners fault the appellate court for setting aside a trial court (inferential) fact finding that was not clearly erroneous and for not offering a clear explanation of principle by which future jurists might know why the basic facts the trial court found can not support the trial court's determination of ultimate fact. Again, Petitioners urge that these failures in the appellate review process merit correction by this Court.

The district court found the state's position to be that the Loop would be federally funded wherever possible [App. 41 - 42], it found the state anticipated adding the Loop to the federal-aid secondary system (of roadways) [App. 42], it found the FHWA's position before the public at large to be federal funds would be used to finance construction of each segment of the Loop [App. 42-43], it found the state in fact anticipated federal funding for the Loop and was so representing to elected local officials [App. 49 and 44], it found the FHWA was representing to interested members of the public it (FHWA) was the lead federal agency for EIS preparation and Endangered Species Act compliance on the Loop [App. 43, note 10], it found Section 7 (federal project) Endangered Species Act consultations were in fact ongoing on the western segment of the Loop [App. 18], it found the FHWA characterized the state as its "consultant" for preparing Loop EISs [App. 54], and it may reasonably be inferred to have found the FHWA was controlling decisions

about how the Loop was segmented [App. 43].[17]

The appellate opinion does not explain why (i.e., by what principle it is) these facts can not support a "federal" fact finding by a trial court.

The appellate court may be enunciating a legal principle that no project may be subject to NEPA restrictions, unless it is currently subject to federal control.[18] The opinion characterizes the "dispositive issue" of the case to be "whether at this juncture sufficient federal involvement exists in the Austin Outer Loop Project to constitute 'major Federal action' affecting the environment under NEPA." App. 9 - 10, emphasis added.

Petitioners equivocate about whether the appellate court's framing of the dispositive issue is exactly how the court actually saw the case, because the several-page discussion that follows the quoted statement focuses on preconditions to forcing preparation of an EIS, but the district court had not ordered an EIS be prepared. Also, the appellate opinion says [App. 11] the district court placed undue reliance on the prospective control aspect of the CEQ's "major federal action" definition, but the opinion does not say historical federal control is a *sine qua non* to the invocation of NEPA restraints on non-federal actors.

If the appellate court is in this case announcing a rule of general applicability that decrees non-federal actors may be restrained from compromising the NEPA process on

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17 The record also reflects other evidence, particularly other representations, not recited in the district court opinion but that support the district court's "federal" determination.

18 Even if this is the appellate court's position, the facts of Section 7 Endangered Species Act consultations and FHWA control of segmentation decisions should still be addressed.

transportation projects only after significant federal control has been exercised *vis-a-vis* the project, then this Court should intervene to prevent the establishment of such an unsound precedent.

As the district court noted [App. 46 - 47], the Federal Highway Administration's own interpretation of its NEPA regulations explicitly endorses the legal theory of Petitioners' case. (Please see note 5, *supra*.) Furthermore, were the fact of significant historical federal control a requisite to preventing non-federal actors from compromising the up-coming or ongoing NEPA process, then clever timing of requests to FHWA for construction approval would allow the routine circumvention of NEPA on federal-aid highway projects.[19] This would turn the concept of federal supremacy on its head.

Appellate fact findings related to the segmentation tests

The appellate opinion concludes with a lengthy discussion regarding proscriptions that may block preproposal segmentation. App. 21 - 32. Even as it writes, the court expresses doubt about whether there are or should be, at least as a consequence of NEPA, proscriptions on segmentation of a contemplated project before it reaches the "proposal" stage.

Petitoners worry those doubts are well-founded. In Petitioners' view, the appellate opinion already excludes from the "proposal" umbrella a plethora of factual situations this Court's Kleppe opinion never intended to exclude. To next suggest in *dicta* the extension of NEPA protection to some

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19 All federal-aid highway projects, as the appellate court correctly notes [App. 9, note 6], are actually state projects that receive federal financial assistance. 23 U.S.C. § 145 (1991).

particularly-characterized subsets of those excluded situations seems unwise; it seems like an unnecessary invitation to the growth of Byzantine legal doctrine.

That said, Petitioners simply want here to bring to this Court's attention the circumstance that this final discussion in the appellate opinion is heavy with fact findings either not in the district court opinion or contrary to those in the district court opinion. For example, the appellate court finds: "appellees have offered no evidence that any segment of the Austin Outer Loop is dependent on any other segment for its utility." App. 27. Well, among the examples of evidence appellees in fact offered was the following testimony of their transportation planning expert[20]:

> Question: Now, . . . we have discussed a bit . . . how the rest of the Loop . . . affects Segment 3. If Segment 3 were taken out of the Loop . . . would the purpose of SH-45 continue to be served?
>
> Answer: The -- no, it wouldn't, not as stated. [The Loop would no longer serve its regional traffic by-pass function.]

Rec. Vol. 16, p. 251.

Similarly, the appellate court found: "MoPac South has utility independent from the Austin Outer Loop as well as Segment 3, and . . .." App. 29. Judge Smith, of course, had found otherwise. App. 67. Petitioners' transportation planning expert had testified MoPac South would not be able

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[20] S.H. 45, referred to in the quotation, is the official designation for the Austin Outer Loop.

to serve its regional transportation function, were it disconnected from Segment 3, and, therefore, without the connection, MoPac South would be an unreasonably large facility. Rec. Vol. 16, p. 253.

These examples demonstrate both the ease with which those who did not hear the evidence can mis-apprehend what the evidence is and how they can mis-infer what the evidence shows. They are examples, if more be needed, of the wisdom of leaving factual determinations in the hands of the trial court judge to the maximum extent possible.

A *caveat* regarding two potential arguments against discretionary review

Certiorari review, of course, is discretionary review, so practical considerations may weigh particularly heavily in the decision to grant or deny review. That being so, the next paragraphs quickly address two arguments Petitioners suspect will be raised in opposition to discretionary review.

The first is one that seems to have preoccupied the appellate court. It is the argument that states would have to forego the benefits of early coordination with FHWA in order to retain the option to build "state" projects not subject to NEPA, if the district court decision were upheld. This worry is simply not well-founded. What happened in the case at bar is that FHWA and state highway officials in their pre-litigation writings accurately described the Austin Outer Loop as a proposed federal project. These descriptions became evidence on which the trial court relied. Admittedly, the officials often made the descriptions in the texts of documents related to early coordination on the project. It is not, however, as though the fact of coordination forced them to write things that were not true.

The "problem" is easily avoided if state highway

officials and FHWA in writings related to their early coordination on projects are simply explicit about what they are doing; they need to say, for example, "An environmental impact statement will be prepared on this project, because the state wishes to retain the possibility to pursue federal funding for some or all of the project."

This Court may also be told it would be a waste of resources to deliberate at length on this *certiorari* petition, because the relevant issues were considered and *certiorari* review denied just a year ago in Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), *cert.* denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991). In fact, the issues of that case and the case at bar are not the same or, even, particularly similar.

Most importantly, Village of Los Ranchos did not raise the core issues raised here by Petitioners. It did not purport to address the impropriety of casual appellate fact finding. It did not address the "proposed/contemplated" issue; Kleppe is not even cited. It did not address whether prospective federal control, if found by the trial court, is germane to enjoining premature non-federal activity.

Village of Los Ranchos involved a two-bridge project over the Rio Grande, a project for which a former mayor and two highway officials testified "federal funding has not been and will not be requested . . .." (at 1479, emphasis added.) The question of the federal or state character of the Austin Outer Loop is not analogous to the question of the federal or state character of the two bridges, because in the case at bar there is absolutely no evidence federal funds will be foregone on the $800 million (or so) loop project [see, App. 49], and FHWA actually stated in its Notice of Intent that federal funds would be used in all segments of the Loop. App. 43.

Village of Los Ranchos also involved the issue of

segmentation of one of the bridges from a federal highway project, but the trial court there found, "[Plaintiffs have] presented no evidence to the Court that the [I-25] project is in any way related to the Montano bridge crossing, ..." (at note 5). The trial court finding in the case at bar, of course, was just the opposite: Segment 3, as its name denotes, is indeed a segment of the Austin Outer Loop. App. 50.

Prayer

In light of the foregoing demonstration of appellate court error that undermines both the tenets of judicial review, *per se*, and the vitality of our nations' cornerstone environmental law, Petitioners pray this Court issue the writ of *certiorari* to the Fifth Circuit Court of Appeals and suspend the mandate of that court. Petitioners frankly believe this Court may appropriately enter a summary disposition of this cause on the merits; a concise and an informative summary disposition might read, "The judgment of the court of appeals in this cause is reversed and the district court opinion, as amended, is ordered published. Anderson v. City of Bessemer City, 740 U.S. 564, 573, 105 S.Ct. 1504, 1511 (1985) and Hawthorn Environmental Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D.Ga. 1976), aff'd *per curiam*, 551 F.2d 1055 (5th Cir.1977)."

91-1608

Supreme Court, U.S.
FILED
APR 3 1992
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

to the Petition for Writ of Certiorari

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Notation of corporate status: No Petitioner is a subsidiary or parent of another corporation.

No. 91-8036
United States Court of Appeals,
Fifth Circuit
Jan. 17, 1992
(950 F. 2d 1129)
Rehearing denied February 24, 1992

SAVE BARTON CREEK ASSOCIATION,
WE CARE AUSTIN and AUSTIN CROSSROADS,

Plaintiffs-Appellees and Cross-Appellants

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and
TEXAS STATE DEPARTMENT OF HIGHWAYS AND
PUBLIC TRANSPORTATION (TDH),

Defendants-Appellants and Cross-Appellees,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,

Intervenor-Defendant and
Appellant-Cross-Appellee.

PER CURIAM:

Plaintiffs/appellees,[1] Save Barton Creek Association, We Care Austin, and Austin Crossroads, three local environmental organizations, brought suit against the defendants/appellants, the Federal Highway Administration ("FHWA"), the Texas State Department of Highways and Public Transportation ("TDH"), and the MoPac South Transportation Corporation ("Corporation"), seeking to enjoin the construction of two highway projects in Austin, Texas. These projects are MoPac South and Segment 3 of a proposed Austin Outer Loop. The district court enjoined the appellants from all construction and development activities on MoPac South south of Hannon Lane and on the entire Austin Outer Loop pending their compliance with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-61 (1982). We reverse.

I. FACTS AND PRIOR PROCEEDINGS

MoPac South and Segment 3 are two roadways planned and now partially constructed in a portion of southwest Travis County, Texas. MoPac South is a 5.5 mile southern extension of a north-south freeway, MoPac, located in West Austin. It was conceived in the early 1980's as a major radial roadway to serve South Austin. Also conceived in the early 1980's, the Austin Outer Loop is a proposed 82

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[1] Note, the plaintiffs cross appeal on three narrow issues: 1) that the district court ignored their "unclean hands" argument to the defendants' equitable laches defense; 2) that the court erred by failing to order NEPA compliance for the year 2006 second phase of MoPac South; and 3) that the court erred in allowing the Corporation to intervene in this case. Since we reverse the district court's injunction, these issues are moot.

mile circumferential freeway which in planning has been divided into five segments. The segment which is to be built in the southwest corridor of the Austin Outer Loop has been designated by the TDH as Segment 3, the second roadway project in dispute. Segment 3 is the portion of the contemplated Austin Outer Loop which will intersect with the southern terminus of MoPac South. Both of these highways, MoPac South and Segment 3, traverse the Austin-area Edwards Aquifer, a sole source drinking water aquifer in southern Travis and northern Hays Counties, southwest of Austin.[2]

The appellees instituted this suit for declaratory and injunctive relief requesting a declaration that the Austin Outer Loop, including Segment 3, and MoPac South were "major Federal actions" for the purposes of NEPA and required the preparation of a regional environmental impact statement ("EIS") prior to their construction. The appellees alleged that the FHWA was in violation of NEPA for allowing continued construction of MoPac South when it was tied in with the rest of MoPac, which was built with federal aid, and also in planning for the construction of the Austin Outer Loop. Furthermore, specifically with regard to the Austin Outer Loop, they asserted that the FHWA allowed the project's unlawful segmentation. Additionally, the appellees argued that the state defendants, the TDH and the Corporation, were acting to frustrate federal environmental law by characterizing the most environmentally sensitive segments of these highway projects as state projects exempt from NEPA. The appellees also contended that the failure to prepare a regional environmental impact statement ("EIS") under NEPA on the Austin Outer Loop would result in irreversible contamination of the Edwards Aquifer, causing a

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[2] We sketch a factual overview of the case here, reserving a further detailing of the facts for our analysis below.

significant hazard to public health.

After conducting a fact intensive bench trial,[3] the district court concluded that commencing construction of Segment 3 without NEPA compliance was improper because the Austin Outer Loop was a proposal for "major Federal action." Thus, Segment 3 could not be segmented from the overall proposal and funded separately prior to completion of the environmental assessment process on the entire Austin Outer Loop pursuant to NEPA. With regard to MoPac South, the district court held that since it had been planned

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[3] Prior to the bench trial, the parties filed a proposed agreed pretrial order containing extensive stipulation of facts. On appeal, a controversy ensued concerning the stipulations. The stipulations on record are divided generally into three groups: stipulations # 1-50, stipulations # 61-63, and stipulations # 64-299. The appellees assert that the district court did not accept the proposed pretrial order for stipulations # 61-299, and thus, the stipulations are largely moot. In essence, according to the appellees, this Court need not expend effort examining the proposed stipulations. In contrast, the appellants contend that, while the district court did not sign the pretrial order, it was duly filed and entered. Furthermore, the district court's memorandum opinion and order was based on the testimony and evidence presented and upon consideration of the arguments of counsel; that body of record evidence included numerous references to the parties' stipulations. Additionally, throughout the bench trial, the district court permitted counsel freely to refer to the stipulations.

At no point before, during, or after the trial did the district court state or imply that it would not accept the stipulations generally or had rejected them specifically. Ultimately, according to the appellants, the appellees have demonstrated no good reason to depart from the accepted rule that matters which are stipulated in the pretrial order are binding upon the parties, absent some modification, and usually cannot be pursued on appeal. Our review of the record also indicates that the appellees themselves utilized the same stipulations they asserted should be rendered largely moot. Consequently, this Court has applied all the stipulations as relevant.

for construction as a part of Segment 3, itself an integral part of a federal project, MoPac South "must necessarily be an integral part of a federal project and subject to NEPA." Furthermore, MoPac South was subject to NEPA "because the project is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290, and the Austin Outer Loop), and it lacks substantial independent utility." Additionally, intimating but in no way describing or making findings about some surreptitious actions on the part of the appellants, the district court alluded to "the questionable nature of the TDH's activity" as well as to the fact that "the evidence does not reveal any measurable good will on the State's part."

In addressing the extent of the injunctive relief, the district court acknowledged the futility of enjoining the construction of MoPac South from U.S. 290 to Slaughter Lane, which was 96% complete, and the construction of MoPac South from Slaughter Lane to Hannon Lane, which was 42% complete. All construction on the Austin Outer Loop and MoPac South south of Hannon Lane, however, was enjoined until the completion of the procedures provided under NEPA for "major Federal action." The district court conceded it could not determine the requisite environmental studies needed to be conducted on the projects. The court simply asserted that it trusted that the federal law could define the requirements of the NEPA EIS. Though it recognized that it lacked the high level of technical expertise to determine whether a regional EIS was necessary, the court did order TDH to prepare an EIS on Segment 3. The district court did not disturb in any way an earlier finding it had made that there was no evidence with respect to environmental injury

resulting from construction of Segment 3 and MoPac South.[4]

II. DISCUSSION

The appellants advance three basic contentions. First, they urge that the appellees' claims are not ripe for judicial review because there has been no "final" administrative action that would permit construction of the proposed highway projects using federal funds. Second, they assert that the TDH has been solely responsible for the planning, design, and construction of both MoPac South and Segment 3 of the Austin Outer Loop. Since state-funded projects are not controlled by FHWA and in no way obligate the federal government to any present or future acts, the highway projects cannot be labeled as "major Federal actions" for the purposes of NEPA. Third, the appellants concede that case law and the FHWA regulations do establish that under certain circumstances, segmentation of federal-aid highway projects can be improper under NEPA. According to the appellants, however, in applying these principles to these projects it is apparent that neither MoPac South nor Segment 3 of the Austin Outer Loop has been improperly segmented from a federal-aid highway project.

A. Ripeness

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[4] At a hearing for a preliminary injunction, the district court heard testimony of the appellees' own expert that no documented case exists in which a highway construction has ever contaminated an aquifer. Furthermore, none of the witnesses were able to offer substantiated evidence of injury to the aquifer. The appellees had relied on the fact that the aquifer has been designated a sole source drinking aquifer, and thus vulnerable to contamination. Ultimately, although the court recognized the aquifer's vulnerability, it found that the appellees had failed to prove substantial threat of irreparable injury if the injunction was not granted.

According to the appellants, this case cannot be ripe for judicial decision absent a final action by the FHWA. Judicial review of federal agency action is governed by the requirement of Section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (1982), which provides that only "final agency action" is subject to judicial review. See, e.g., Lujan v. National Wildlife Fed'n, --- U.S. ----, 110 S.Ct. 3177, 3185, 111 L.Ed.2d 695 (1990). The appellants contend that even if one assumes for argument's sake that the district court could have found that NEPA does apply in this case, the FHWA has taken no final action upon which to base APA review as to either MoPac South or any part of a proposed Austin Outer Loop. The FHWA has not approved a draft EIS for public circulation, a final EIS, a location, or funding for any part of either MoPac South or Segment 3 of the Austin Outer Loop.

We recognize that the requirement of finality has been applied in actions seeking to enjoin on environmental grounds the construction of highways. The appellants point to several cases in which the rule requiring finality and the related and overlapping doctrine of ripeness have been exercised to conclude that court intervention would not only be a waste of judicial resources, but also improper interference in the administrative process. Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 243 (10th Cir.1991) (finding Ash Creek's action unripe for judicial review because it has failed to show that the "Department [of Interior]'s proposed exchange of the Ash Creek Coal Leasing Tract for the Whitney Benefits Tract constitutes 'final agency action' ") (emphasis in original); Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir.1980) (concluding that the Corps of Engineers' issuance of a recommendation report of further study of the Hudson River Skimming Project not yet under construction could not be characterized as a "final agency

action"); Eastern Connecticut Citizens Action Group v. Dole, 638 F.Supp. 1297, 1299-1300 (D.Conn.), aff'd per curiam, 804 F.2d 804 (2d Cir.1986), cert. denied, 481 U.S. 1068, 107 S.Ct. 2460, 95 L.Ed.2d 869 (1987) (finding the claims not ripe for judicial review because, inter alia, no construction had begun on proposed Relocated Route 6).

These cases are properly distinguishable from the case on appeal. Our decision does not resolve a dispute concerning "a hypothetical highway"; we are not "adjudicating the legality of non-events." See National Wildlife Fed'n v. Goldschmidt, 677 F.2d 259, 263 (2d Cir.1982). This case involves concrete disputes over tangible interests having immediate and practical impact. We acknowledge that the two projects at issue may become a part of a larger project. But that project may never come to fruition. At this stage, Segments 1, 2, 4, and 5 of the Austin Outer Loop are merely tentative, preliminary, and at best contemplated actions. We must address the issues raised, however, because they arise from the portions of the proposed larger project which have been or are being built.

As of the date of the district court's decision, construction of MoPac South from U.S. 290 to Slaughter Lane was 96% complete, and construction of MoPac South from Slaughter Lane to Hannon Lane was 42% complete.[5] Additionally, construction of Segment 3 was approximately 10% complete. We are governed by the finality requirement which is to be interpreted in a "pragmatic way." Abbott Lab. v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 1516, 18 L.Ed.2d 681 (1967). We hold that this case cannot be dismissed on ripeness grounds. These projects have left the

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[5] Furthermore, as the district court acknowledged, the TDH has expended over $10,000,000 in the construction of MoPac South and the Corporation has donated over $10,000,000 worth of right-of-way and services to the state for MoPac South.

drawing board and have entered varied stages of construction. Thus, we turn to the question of whether these projects fall within the purview of NEPA.

B. Major Federal Action

The district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an erroneous legal conclusion that the Austin Outer Loop constitutes a " 'proposal for major [F]ederal action' subject [to] an environmental document." NEPA requires that federal agencies consider the environmental consequences of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The requirements of NEPA, which include, among other things, the submission of an EIS, apply only when the federal government's involvement in a project is sufficient to constitute "major Federal action."[6] Thus, the dispositive issue in this case is

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[6] The statutory and regulatory criteria for federal-aid highway funding is an elaborate, intricate scheme. Title 23 of the United States Code sets forth the legal framework for the federal-aid highway program, which is, in reality, a federally assisted state program. 23 U.S.C. § 145 (1988). The states own, construct, and maintain the highways which form the federal-aid highways within their borders. The state's incremental stages of highway construction are included in the state's programs of projects which are submitted to the FHWA for approval pursuant to 23 U.S.C. § 105. Section 105 of 23 U.S.C. provides that a state desiring to avail itself of the benefits of federal assistance must submit to the FHWA a program of projects for which federal aid may be sought, known as the "105 Program." Recognizing that a state ultimately may not seek federal aid for some projects on a 105 Program, the FHWA regulations contemplate early environmental coordination between the state and the FHWA, prior to the state's actual proposal and request for federal funding assistance. 23 C.F.R. § 771.111.

Programs may be approved in whole or in part, but the FHWA

whether at this juncture sufficient federal involvement exists in the Austin Outer Loop Project to constitute "major Federal action" affecting the environment under NEPA. We are cognizant that "[t]he purpose of NEPA is to require that federal decision-makers consider the environmental consequences of their actions before deciding to proceed." Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir.1976) (en banc) (emphasis added).

No litmus test exists to determine what constitutes "major Federal action." Furthermore, "[f]ederal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA." Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1480 (10th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1017, 112

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is prohibited by law from approving any project on a proposed program which is not part of an approved federal-aid system. Program approval does not constitute an obligation of funds, or establish a date of eligibility for federal funding. 23 C.F.R. § 630.112(c) (1991). If a project is to be federally funded, however, it must first be listed on a program approved by the FHWA. In addition to being part of an FHWA approved federal-aid highway system and included in an approved Section 105 Program, a project must also meet the requirements of environmental regulations to qualify as an FHWA project. Under the FHWA regulation, a project cannot be eligible for agency funding unless: it is determined to be a categorical exclusion (need not be subject to environmental analysis); is found to have no significant impact as a result of an environmental assessment; or is the subject of an FHWA approved final EIS and record of decision. 23 C.F.R. § 771.113. Furthermore, for a highway to qualify for federal-aid funding, it must also have its plans, specifications, and estimates approved by the FHWA, and receive prior concurrence from the FHWA before the award of the construction contracts.

None of these requirements has been met by either MoPac South or any segment of the Austin Outer Loop. Accordingly, neither project is presently eligible for federal funding, and neither is a federal-aid highway project subject to NEPA as a result of asserted FHWA involvement.

L.Ed.2d 1099 (1991). Yet both the federal regulations and the courts have attempted to provide guidance as to what constitutes "major Federal action."

The Council on Environmental Quality ("CEQ") has issued regulations defining "major Federal action." These regulations are entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979). The regulations provide that "major Federal action" encompasses not only actions by the federal government, but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (1991) (emphasis added). The district court placed heavy reliance on this regulation in making its determination that the Austin Outer Loop is a "major Federal action."

We recognize that "major Federal action" can exist when the primary actors are not federal agencies. Nonetheless, the district court appears to have placed undue reliance on only a portion of the CEQ's regulation by focusing solely on the "potentially subject" factor, while dismissing with seeming facility the "Federal control and responsibility" factor. "[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes [the decision-maker] has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over outcome." W. Rodgers, Environmental Law § 7.6, at 763 (1977).

In an attempt to find the requisite amount of federal involvement necessary to trigger the applicability of NEPA, some courts have echoed the CEQ's regulations and the suggestions of commentators, and asserted that the touchstone of "major Federal action" constitutes a federal agency's authority to influence nonfederal activity. "[T]he federal

agency must possess actual power to control the nonfederal activity." Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir.1988). See, e.g., Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333, 1347 (5th Cir.1979) (federal funding assistance for local planning process does not alone constitute "major Federal action" where all decisions are entrusted to the state and local agencies).[7] Ultimately, "we do not quarrel with the proposition that federal involvement can in some circumstances be so massive, so pervasive, that 'the acts of the state are in reality federal actions.' " Atlanta Coalition, 599 F.2d at 1346 (citation omitted).[8]

The extensive record on appeal, however, fails to show any evidence of any significant federal involvement, much less "massive" involvement. At the present time, work on MoPac South and Segment 3 of the Austin Outer Loop has progressed through right-of-way acquisition to construction without FHWA approval or funding. Furthermore, state and local funding of these projects can never be reimbursed by the FHWA because the state did not

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[7] Another characterization of this control factor is whether federal involvement in a nonfederal project is sufficient to "federalize" the project for purposes of NEPA. See, e.g., Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir.1986); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836, 101 S.Ct. 110, 66 L.Ed.2d 43 (1980). The appellees contend that both Segment 3 and MoPac construction should not commence prior to a NEPA analysis because the number of federal controls on both projects is adequate to "federalize" them.

[8] A less pervasive view is that a highway project constitutes a "major Federal action" upon receipt of location approval from the FHWA. See, e.g., City of Boston v. Volpe, 464 F.2d 254 (1st Cir.1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir.1971); Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D.Cal.1972).

obtain prior authorization from the FHWA for the expenditure of funds, did not obtain FHWA approval of plans, specifications and estimates, and did not obtain concurrence from the FHWA before awarding the construction contracts. 23 U.S.C. §§ 106, 112(d) (1988); 23 C.F.R. § 1.9(a) (1991).

In actuality, no federal funds have been requested or spent, and no federal approvals have been given. The state is simply building some highways for its own use. Of particular importance is the fact that the federal authorities strongly disavow any interest in these highways. They also are appellants with the state officials in this case. The only federal touching of the projects at all consists of state officials taking advantage of the FHWA's early coordination procedure and beginning to compile NEPA compliance documentation so as to preserve state eligibility for federal funding.

Though the district court acknowledged that "[t]he mere prospect of future federal funding is not enough," it did take specific notice that according to the "Current Status Report" on the Austin Outer Loop, Segments 1, 2, 4, and 5 "are headed for some federal funding." Furthermore, the court specifically referred to testimony from a TDH engineer that at the estimated cost of the Outer Loop, somewhere between $400 and 800 million, the project is " 'not likely' [to] be funded by the state alone." Additionally, although the district court recognized that the TDH has not requested any federal aid for any section of the Austin Outer Loop, it found the probability of a request for federal funding "too great" to allow the TDH to construct one portion of the Austin Outer Loop without following federal law. This Court has recognized, however, that "the possibility of federal funding in the future for a project or group of projects does not make that project or projects 'major [F]ederal action' during the planning stage." Atlanta Coalition, 599 F.2d at 1347

(citations omitted). See also City of Boston v. Volpe, 464 F.2d 254, 258 (1st Cir.1972) ("[T]he adoption of certain federal standards and specifications in the hope of qualifying for federal assistance cannot transform a state or local project into a federal one").

Furthermore, even if the district court were correct that the state contemplates constructing some of the speculative Austin Outer Loop with federal funds, it does not follow that an EIS is now required. Until there has been a "proposal,"[9] and until there has been a "recommendation or report" on that proposal, there is no requirement for an EIS.[10] Kleppe

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[9] A " '[p]roposal' exists at that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23 (1991).

[10] The Congress authorizes and directs that, to the fullest extent possible: ... (2) all agencies of the Federal Government shall--

* * * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA § 102, 42 U.S.C. § 4332 (emphasis added); see also 40 C.F.R. § 1508.12 (1991) (defining "federal agency"); id. § 1508.18 ("major Federal action"); id. § 1508.27 ("significantly"); id. § 1508.3

v. Sierra Club, 427 U.S. 390, 405-06, 96 S.Ct. 2718, 2728, 49 L.Ed.2d 576 (1976) (quoting Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320, 95 S.Ct. 2336, 2356, 45 L.Ed.2d 191 (1975)). The "proposal" requirement, then, is a statutory requirement grounded in the language of Section 102(2)(C) of NEPA that governs the time when an EIS should be prepared. In essence, the appellees can prevail only if there has been a report or recommendation on a proposal for "major Federal action" with respect to MoPac South and Segment 3 as part of a possible future Austin Outer Loop. In concluding that the Austin Outer Loop is a "proposal" for "major Federal action," the district court incorrectly elevated FHWA's early coordination process to the status of a "proposal" under NEPA.

Our scrutiny of the record shows that neither MoPac South nor any segment of the Austin Outer Loop, including Segment 3, has yet acquired the status of a formal proposal requiring federal approval. The district court placed much emphasis on the state's preliminary planning steps taken on the two projects, particularly the state's early compliance with the eligibility requirements for federal funding for MoPac South and Segment 3.

Initially, the TDH explored the possibility of making MoPac South eligible for § 105 Program federal-aid funding. Accordingly, the TDH submitted an environmental assessment ("EA")[11] for MoPac South to the FHWA's Division Office in Austin. The TDH's submission determined that MoPac South, if federal funds were sought,

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("affecting"); id. § 1508.14 ("human environment").

11 An environmental assessment is a brief public document that, inter alia, provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).

would warrant the preparation of a NEPA EIS. However, the FHWA never committed nor reimbursed any funds for the planning, design, right-of-way acquisition, or construction of MoPac South. Additionally, in September 1988, the FHWA informed TDH that MoPac South was ineligible for federal funding because it was not then on any federal aid system. In essence, though the TDH originally contemplated potential federal involvement, nothing ever came to fruition. The TDH planned the location and design of MoPac South without FHWA overview or approval. Although there was some preliminary consideration during the early developmental stage of an application for federal funds, the project became purely a function of the state.

With regard to Segment 3, the TDH prepared an overview environmental assessment ("OEA") for the Austin Outer Loop, stating the history of the project, the need for it, and potential alternatives to the project. The OEA also established that the Austin Outer Loop would be divided into four segments for planning and development purposes. Intending to preserve federal aid eligibility for the Austin Outer Loop segments, the TDH submitted the OEA to the FHWA in 1986 for early NEPA coordination analysis. The FHWA approved the OEA in January 1987. The FHWA subsequently announced that the Austin Outer Loop would be segmented into multiple segments for the purposes of design, planning, environmental review, and construction approval. 52 Fed.Reg. 32,090 (Aug. 25, 1987).

Since the August 1987 Federal Register segmentation announcement, the Austin Outer Loop has undergone two re-segmentations. In September 1987, TDH approved a re-segmentation of the original Segment 3 into 3A and 3B, and subsequently informed the FHWA of its actions. Expressing concern about the proposed re-segmentation, the FHWA continued collaborating with the TDH to make the segments meet the requirements to maintain federal funding

eligibility.

Ultimately, the TDH concurred with the FHWA's suggestion to divide the Austin Outer Loop into five segments, each ending at major radial roadways. This proffered segmentation is the current division of the proposed Austin Outer Loop. In essence, the only control FHWA has exercised to date over the Austin Outer Loop is the suggestion of its re-segmentation in order for TDH to retain eligibility for federal aid funds. Segment 3 is just one of many state projects that has federal assistance at an exploratory stage and then is completed wholly through state funding.

Upon reviewing the record, particularly the evidence found persuasive by the district court,[12] we find that none of the early coordination activities by the state with the federal government constitute the requisite "major Federal action." The crux of the district court's opinion was a determination that the Austin Outer Loop is a " 'proposal for major [F]ederal action.' " Having made that assessment, it rather cursorily concluded that Segment 3 is an integral part of a federal project, as is MoPac South, since it was planned for construction as part of Segment 3.

Because of the district court's complete reliance on the

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12 The appellees were also significantly influenced by the state's early coordination actions. They attempted to contest the "proposal" notion by simply stating that the Austin Outer Loop project had "reached a very highly defined level prior to suit." According to the appellees, the project was sufficiently defined to support the FHWA's "very public announcement of NEPA environmental impact statements"; it was sufficiently defined to support FHWA approval of a NEPA environmental assessment; and finally, by the time of trial, NEPA EISS were being drafted for all segments except Segment 3. Of course, the preliminary drafting of an EIS is a step far removed from federal approval, and indeed may be used by the state to make its own environmental evaluation.

Austin Outer Loop as a "major Federal action," some further evaluation of the status of the Austin Outer Loop is necessary. Major construction projects, like the Austin Outer Loop, customarily change in design, cost, scope, and impact over the years required for development. The segments of the Austin Outer Loop are planned to be constructed at different times in the future over a period of many years. Furthermore, the financing, specific location, and construction timing of other segments are subject to change. More important, some segments of the Austin Outer Loop may never be built. In essence, the construction of an outer loop around Austin is, at most, a contemplated action, which at this point exists only as a concept in a long range plan that is subject to constant revision. The record is silent with regard to any meaningful federal participation or control exercised over the project in this case. There has been no federal commitment and only minimal federal intervention.

Since the FHWA has at this time given no approvals--whether it be approval of a final EIS, approval of design, approval of location, or approval of funding--there has been no "major Federal action" in connection with any segment of the Austin Outer Loop. The "federal imprimatur" that sometimes attaches to state projects is simply not present in this case. Hawthorn Envtl. Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D.Ga.1976), aff'd per curiam, 551 F.2d 1055, 1056 (5th Cir.1977). A state may, after all, proceed with construction of its projects wholly independently of the federal government.

Our holding today is consistent with other recent precedent. In Macht v. Skinner, 916 F.2d 13, 16 (footnote omitted) (D.C.Cir.1990), the Court held that while the Urban Mass Transportation Administration ("UMTA") had given Maryland $2.5 million for preliminary engineering studies and environmental impact statements for the proposed extensions to the Light Rail Project, and while Maryland had

to obtain an Army Corps of Engineers permit, these facts were insufficient "to transform the entirely state-funded Light Rail Project into 'major [F]ederal action' affecting the environment within the meaning of NEPA." Furthermore, the Court was unpersuaded by the contention that the project constituted "major Federal action" because Maryland had hoped to obtain a $40 million UMTA grant to build extensions to the state project sometime in the future. According to the Court, "in this era of federal fiscal shortcomings there is a wide gulf between what a state may want and what the federal government is willing to provide." Id. at 17 (citing district court memorandum opinion). The D.C. Circuit Court rejected requiring NEPA environmental consideration at a far higher threshold of federal activity than is present in the case before us.

The Tenth Circuit made a similar determination in Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991). Faced with a state-planned highway bridge project which had retained eligibility for federal funding, the Court rejected the contention that the FHWA's assistance in, and approval of, the EIS was sufficient to make the bridge project a "major Federal action" within the purview of NEPA. Further, and relevant to our case, the Court asserted:

> Congress has not applied NEPA to all highways that the states are eligible to fund with federal dollars.... The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative option (using state dollars) might result in less adequate assessment of environmental

> considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement.

906 F.2d at 1481 (quoting Citizens for Balanced Env't & Transp., Inc. v. Volpe, 376 F.Supp. 806, 812-13 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975) (emphasis in original)). Here again the Court found that a much higher level of federal commitment and involvement than that present in the case before us (an EIS having been prepared and approved) as insufficient to constitute "major Federal action."

The appellees assert that the mechanistic approach to "federal" status advocated by the appellants, the FHWA, the TDH, and the Corporation, would make NEPA a "dead letter law for highway projects." We disagree. To the contrary, the appellants are merely adhering to the law and are recognizing that Congress limited the EIS requirement to "major Federal actions." "Although desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex.L.Rev. 801, 837 (1977) (footnote omitted). See also Movement Against Destruction v. Volpe, 361 F.Supp. 1360, 1383 (D.Md.1973), aff'd, 500 F.2d 29 (4th Cir.1974) ("Despite the breadth of the NEPA, its application is only to the decision making processes of the Federal government.") (citation omitted).

In sum, the error of the district court lies in concluding that these two highway projects are an integral part of an Austin Outer Loop. The outer loop does not exist

except in speculative plans for years ahead. The federal authorities as well as state authorities recognize this. The undisputed facts are that Segment 3 and MoPac South have been financed with non-federal funds and have been designed and built without federal approval and authorization. We hold that these projects do not constitute nor are they are part of any project constituting "major Federal action" within the contemplation of 42 U.S.C. § 4332(2)(C).

C. Segmentation

We have recognized that the proposed Austin Outer Loop as yet has not even achieved a nascent state. Both federal and state governments agree that this is not a highway plan for an outer loop which can at the present time be classified as a "major Federal action" and also be eligible for federal aid. There remains the assertion that the state has chosen the most environmentally sensitive segment of this highly tentative plan for immediate construction without federal aid for the purpose of avoiding NEPA. While the district court hinted at this possibility, it did not so hold and did not make findings that would support it.[13]

The case law which deals with such improper segmentation almost always involves a situation where a "major Federal action" is found to exist and then the segmentation is evaluated as an escape from the NEPA

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13 Without specifically accusing the state of covert or surreptitious actions, the district court stated that TDH's "intentions regarding Segment 3 may have been on the 'up and up': however, the evidence does not reveal any measurable good will on the State's part." Perhaps the district court by this wording was trying to avoid a harsh statement of criticism of the state officials. But the fact must be faced that the lack of proof of "measurable good will" has no legal significance. The record reveals no proof of ill-will or impropriety.

application which is otherwise immediate.[14] See, e.g., Macht v. Skinner, 916 F.2d 13, 16 n. 4 (D.C.Cir.1990) ("Because we hold that the Light Rail Project does not involve 'major [F]ederal action,' we do not decide whether the district court correctly held that Maryland's segmentation of the Project was proper."). Segmentation cases consider only whether a federal project has been improperly segmented to avoid compliance with NEPA. See, e.g., Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C.Cir.1987); Swain v. Brinegar, 542 F.2d 364 (7th Cir.1976) (en banc); Indian Lookout Alliance v. Volpe, 484.

The possibility does exist, however, that a state could improperly segment out critical portions of a proposed project before the project was developed to the stage of becoming a "major Federal action." By this means, a state could circumvent those segmentation actions which would be found to be illegal if the project were developed to the "major Federal action" stage. Segmentation analysis functions "to weed out projects which are pretextually segmented, and for which there is no independent reason to exist. When the segmentation project has no independent jurisdiction, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." Macht v. Skinner, 715 F.Supp. 1131, 1135 (D.D.C.1989) (emphasis in original), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table). Further, in Village of Los Ranchos de Albuquerque, the Tenth Circuit distinguished its case from a case in which local defendants

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[14] Short of a completely exhaustive search, we found only two cases in which there was an evaluation of segmentation without a finding of "major Federal action." See Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir.1990); Macht v. Skinner, 715 F.Supp. 1131 (D.D.C.1989), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table) (an earlier decision in a related case to the case referred to in the immediately following text).

were involved "in a sham transaction to evade federal environmental requirements." Id. at 1482. We consider whether such a subterfuge by the state occurred.

In making its determinations, the district court relied heavily on Hawthorn Environmental Preservation Association v. Coleman, 417 F.Supp. 1091 (N.D.Ga.1976), aff'd per curiam, 551 F.2d 1055 (5th Cir.1977) and Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir.1971), cert. denied, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d 136 (1972) (hereinafter San Antonio I). This reliance was pivotal. The district court may have felt compelled to find a probability of "major Federal action," so as to curtail the result of what it perceived as a "naturally suspect" motive--the segmentation of the Austin Outer Loop at the portion which traverses the Edward's Aquifer. The trial court's inexorably intertwined analysis of "major Federal action" and segmentation requires this Court to address the issue of segmentation even though there is strong case authority that segmentation does not become an issue until "major Federal action" is established.

"Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. This claim is a major part of the charge made by plaintiffs in this case. "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. Unit B 1981). Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related

projects.[15] See, e.g., Piedmont Heights, 637 F.2d at 439; San Antonio I, 446 F.2d at 1024-26. In the context of a highway within a single metropolitan area, as the case at issue--as opposed to projects joining cities--courts have focused more on the factor of "independent utility." See, e.g., Coalition on Sensible Transp., 826 F.2d at 69; Piedmont Heights, 637 F.2d at 440. Consequently, our analysis, while assigning the other factors their modest weight, will focus primarily on the "independent utility" factor. See, Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101, 1108 (N.D.Tex.1985) ("the illogic of a terminus is at best a secondary inquiry, shadowed by the independent utility inquiry") (citation omitted).

With these considerations in mind, we address Hawthorn and San Antonio I. Contrary to the district court's determination, we find that these cases posit significant and controlling differences with our present case.

In Hawthorn, the construction of a bypass of the City

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[15] These factors are embodied in the FHWA's NEPA implementation regulations.

> (f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:
> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> (2) Have independent utility or independent significance ...; and
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f) (1991). Of course, absent a finding of "major Federal action," these criteria do not apply. They apply only "to actions where [FHWA] exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals ... are not subject to this regulation." Id. at 771.109(a)(1).

of Newnan, Georgia, was at issue. To perform its intended function, the entire bypass had to be constructed. The bypass had been conceived as one project and its two segments, Phase I and Phase II, were proposed to be constructed simultaneously. It was also clear that absent the construction of Phase II, the segment proposed for federal funding, Phase I, the state funded segment, would not be constructed because it could not be utilized. The court, acknowledging the "sufficiently great prospects" of Phase II becoming 'major Federal action,' " focused on the question of segmentation. 417 F.Supp. at 1101. It found that absent any persuasive evidence of independent utility, "the defendants had violated the mandates of federal environmental law and policy by failing to conduct proper studies concerning the construction of [Phase I] of the Newnan Bypass." Id. The court properly held that Phase I was merely a segment of an overall project, consisting of both Phase I and Phase II, and the provisions of NEPA were applicable.

In contrast, the segments of the Austin Outer Loop are planned to be constructed if at all at different times in the future over a period of years. It is not one continuous project as anticipated in Hawthorn. Further, our review of the record indicates that unlike the state-funded segment of the Hawthorn bypass, the partially constructed segment of the Austin Outer Loop, Segment 3, as well as MoPac South, will have substantial independent utility. Together, they will serve a highly useful urban traffic purpose even if no other segments of the Outer Loop are ever constructed.

San Antonio is also readily distinguishable on its facts from this case. There, the Secretary of Transportation had approved Texas' request for federal participation, authorization, and financial assistance in a highway project which was to cross San Antonio's Brackenridge Park. The project was challenged for failure to comply with Section 4(f) of the Department of Transportation Act, which generally

prohibits, inter alia, the use of federal funds to build highways through parks of local significance.[16] The state then decided to divide the project into three segments. The federal government would be asked to fund the two end segments, and the state would fund the middle segment that would actually cross the park. This Court found that the state had impermissibly segmented a highway project running through park lands in order to evade federal environmental regulations. It was deemed significant that segments of the highway on both sides of the park were to be constructed with federal funds, and none of the three segments had logical termini or independent utility. In clear contrast, both the segment of the Austin Outer Loop as well as MoPac South fully comport with both case law and FHWA's regulations requiring that segments have independent utility, connect with logical termini, and do not foreclose the opportunity to consider alternatives.[17]

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[16] Section 4(f), formerly at 49 U.S.C. § 1653(f), was repealed in 1983 when it was codified without substantive change as 49 U.S.C. § 303. See also 23 U.S.C. § 138. The policies section 4(f) engendered, however, are still widely referred to as "section 4(f) matters." See, e.g., 23 C.F.R. Part 771 (1991).

[17] The Austin Outer Loop is more closely analogous to the 3-A system of interstate and primary highways in the City of Baltimore which was the subject of litigation in Movement Against Destruction v. Volpe, 361 F.Supp. 1360 (D.Md.1973) (per curiam), aff'd per curiam, 500 F.2d 29 (4th Cir.1974). There, the plaintiffs challenged the FHWA's failure to prepare an EIS prior to its approval of the system plan for interconnected and interdependent highways. The court recognized that each component of the 3-A system served different functions and provided a useful facility even if the others were not constructed. It held that there was "no 'major [F]ederal action' which treated the 3-A system as a unit, and, therefore, under the plain language of the NEPA no EIS [was] required for the '3-A system' as a whole." Id. at 1383. See also Association Concerned About

None of the segments of the proposed Austin Outer Loop are scheduled for simultaneous or continuous construction as anticipated in Hawthorn and San Antonio I. The appellees have offered no evidence that any segment of the Austin Outer Loop is dependent on any other segment for its utility. The proper question is whether the Segment 3 project serves a significant purpose even if the other related projects, the other segments, are not built for a long time or perhaps not at all. See, Coalition on Sensible Transp. Inc. v. Dole, 826 F.2d 60, 69 (D.C.Cir.1987) (highway and interchange projects serve necessary purposes in absence of I-270 expansion and are sufficiently independent); Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 299 (D.C.Cir.1987) (per curiam) (substantial independent utility recognized in a four-mile section of mass transit project originally planned as 18.6 miles); Piedmont Heights, 637 F.2d at 440-41 (urban highway projects, although related to overall transportation plan, held to contribute individually to improving traffic conditions).

The contentions of the federal and state officials are sound. Segment 3 satisfies the FHWA's standards for proper segmentation. Segment 3 meets the significant criterion of independent utility. It increases the utility of the existing roadway network by providing effective access between two major radial highways. Segment 3 also will serve local needs. It will provide improved access to business and residential developments and to community and recreational features which will be accessible by intersecting roads. Furthermore, it will relieve traffic on arterial and city

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Tomorrow, Inc. v. Dole, 610 F.Supp. 1101 (N.D.Tex.1985) (finding that the segmentation of Loop 9 around Dallas County into segments or "legs" was an appropriate decision for the purposes of planning and development, including NEPA analysis; the legs of Loop were not proposed for contemporaneous construction and had significant independent utility).

streets. Segment 3 also satisfies the logical termini requirement. Its termini are located at nodes of commercial and traffic activity; they were chosen based on population and usage forecasts. Moreover, Segment 3 does not restrict consideration of alternatives. The construction of Segment 3 does not dictate that any other segment must be built, nor does it dictate the size of a segment if built, nor control the alignment of the rest of the Austin Outer Loop.

The appellees contend that the end points of Segment 3 drastically limit "the reasonable alternatives" for the end points of Segments 2 and 4. An answer to this contention is that Segment 3 is a state project to which the requirements of federal regulations do not apply. Assuming the regulations applied, however, Segment 3 would nonetheless comply with them. Segments 2 and 4 may never be built; neither segment is shown to be required to connect with Segment 3 in order to be functional. Even if Segments 2 and 4 were ultimately to connect with Segment 3, alternatives available for their location are many; the regulations require no more.

With regard to MoPac South, the district court ruled that it must comply with NEPA because it "is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290, and the Austin Outer Loop), and it lacks substantial independent utility." But this ruling when placed in its context would mean that every time a state or local government desires to build a non-federal aid highway project (MoPac South) that connects to existing federal highways (MoPac and U.S. 290), the project would be subject to NEPA because it would be "dependent" on the federal facilities. This extrapolation is attenuated at best. All proposed highways, when constructed, must eventually connect to an existing highway. Every roadway section that is added to a highway network is dependent upon and connected to the rest of the network. See, Named Individual Members of San Antonio Conservation Soc'y v. Texas

Highway Dep't, 496 F.2d 1017, 1024 (5th Cir.1974), cert. denied, 420 U.S. 926, 95 S.Ct. 1123, 43 L.Ed.2d 396 (1975) (hereinafter San Antonio (II)) ("virtually every road in the country crosses or interchanges with federal-aid highways, and ... there are many state-constructed roads which do not form a part of the federal network"). See also Village of Los Ranchos de Albuquerque, 906 F.2d at 1483 ("'Congress has not purported to apply NEPA requirements to [e]very highway that connects with a federally-funded highway' ") (quoting Citizens for Balanced Env't & Transp., Inc. v. Volpe, 376 F.Supp. 806, 810 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975)).

Ample evidence establishes that the MoPac and U.S. 290 highways have served a useful transportation function for years without the aid of MoPac South. These roads then cannot be the basis for a "lack of independent utility" finding in connection with MoPac South. MoPac South has utility independent from the Austin Outer Loop as well as Segment 3, and has a significant purpose even if the other projects are never built. Currently, as planned, MoPac South will be a limited access roadway, unlike any north-south roadway in southwest Travis county.

One of MoPac South's significant functions would be achieved regardless of the existence of Segment 3 as its southern terminus. MoPac South will serve local needs by improving the access for Austin residents to such community uses as retail establishments, places of worship, as well as cultural and recreational areas. The logical termini requirement is also satisfied. The north terminus of MoPac South is located at an intersection with U.S. 290, a major east-west highway, and connects with the existing MoPac, a major north-south highway, thus improving the efficiency of all three roadways. Moreover, MoPac South does not foreclose consideration of alternatives. For instance, to

appease the concern that MoPac South restricts alternatives because its southern-most point determines the alignment of Segment 3, the state designated Hannon Lane as the alternative southern terminus should Segment 3 not be built.

We have addressed the central question in the challenge of improper segmentation--whether Segment 3 and MoPac South serve significant purposes and have the requisite independent utility. The record clearly indicates that the two projects serve such purposes and are sufficiently independent even in the absence of MoPac, U.S. 290, and the Austin Outer Loop. This Court finds that both Segment 3 and MoPac South would meet the elements enumerated in Piedmont Heights to fall outside of NEPA's purview.

Finally, we feel compelled to address the district court's continuous reference to potentially suspect behavior on the part of the state.[18] The federal and state officials to the contrary rely primarily on Bennett v. Taylor, 505 F.Supp. 800, 810 n. 4 (M.D.La.1980), stating that, in NEPA suits, "motives of the state authorities are by and large irrelevant to this inquiry since the law applies to those projects specified by the Congress without regard to intent of either state or federal authorities." But the appellees in supporting the court's judgment place much reliance on Environmental Defense Fund v. Marsh, 651 F.2d 983, 999 n. 19 (5th Cir. Unit A 1981) to show the relevance of motive in an improper segmentation case. In Marsh, we stated that we believed Kleppe allows courts "to prohibit segmentation ... if an agency has egregiously or arbitrarily violated the

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[18] Comments by the district court included: "TDH's motive for segmenting the portion of the [Austin Outer Loop] which traverses the area most environmentally sensitive is naturally suspect," and "TDH's intentions regarding Segment 3 may have been on the 'up and up'; however, the evidence does not reveal any measurable good will on the State's part."

underlying purpose of NEPA." This principle is sound but it does not control this case.

In addressing the issue of motivation, we draw guidance from Macht v. Skinner, 715 F.Supp. 1131, 1135 (D.D.C.), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table). There, the district court suggested that the segmentation analysis advocated by Piedmont and its progeny has the effect of replacing "a subjective analysis of motivation with a set of objective criteria." Thus, "states are entitled to invoke the segmentation doctrine to insulate their construction projects from federal environmental law, so long as they meet the objective criteria of compliance." According to the court, "this is a legitimate choice for the State to make, and ... requiring [the State] to comply with NEPA simply because it has tried to plan its project so as to avoid federal law would be an unfair surprise." Id. (emphasis in original). See also Citizens for Balanced Environ. & Transp., Inc. v. Volpe, 376 F.Supp. 806, 813 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975), in which the court said: "[T]he State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement."

We recognize that if a state has segmented for the purpose of evading federal environmental requirements and without other valid justifications, a holding of evasive violation would be justified. This Court does not "condone any form of subterfuge." San Antonio I, 446 F.2d at 1029 (Clark, J., concurring in part and dissenting in part). We have no such case here, and the district court made no findings leading to such a conclusion. Our review of the record reveals no improper segmentation. In this case, the

state entertained various options for Segment 3 and MoPac South and concluded that the use of state funds would enable it to proceed without the delays and expenses associated with compliance with federal environmental law.[19] There is nothing in the federal law to compel a state to ask for federal highway aid because there are environmental concerns. States are capable of dealing with environmental matters. Often overlooked is the limited scope of the federal legislation which recognizes this. We find no improper segmentation of a large highway project in this case.

III. CONCLUSION

Early coordination or compliance with the eligibility requirements for federal funding alone does not constitute a "proposal" for "major Federal action." Where the actions at issue have been taken by the state authorities without substantive federal supervision, authorization, commitment, or control, and will never be subject to review or approval by a federal agency, there can be no finding of "major Federal action" within the meaning of NEPA. With no control, right to control, or even the prerogative to suggest compliance with federal standards by FHWA, we find that the projects at issue are state projects. Both the state and federal governments agree. In this case, the state did not voluntarily submit itself

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[19] The evidence most relied upon by appellants in undertaking to establish improper motive in segmentation includes a portion from the Corporation's Technical Brief to the TDH and a letter from the Corporation's primary developer to an earlier TDH Chairman. In each instance appellees omitted following language that revealed clear concern by the TDH as to environmental matters and statements that the state planned its own environmental evaluations. The statement also indicated a need for expedited action and avoidance of long drawn-out federal proceedings--a valid state concern. See Macht v. Skinner, 715 F.Supp. at 1135.

to federal law. Further, there is no showing that the state segmented a larger project for the purposes of circumventing the application of federal law.

We reverse the judgment of the trial court and rule that both Segment 3 of the proposed Austin Outer Loop and MoPac South are state projects not subject to the requirements of NEPA.

REVERSED.

INJUNCTION DISSOLVED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
(March 6, 1990 - unpublished)

Civil Action A-89-CA-719

SAVE BARTON CREEK ASSOCIATION, WE CARE AUSTIN and AUSTIN CROSSROADS,
Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Defendants,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,
Intervenor.

MEMORANDUM OPINION AND ORDER

On the 7th-9th days of February, 1990, this case came on for trial before the Court without a jury. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the Court enters the following findings of fact and conclusions of law.

This is an action for declaratory and injunctive relief relating to the proposed construction of two highways--MoPac South and the Austin Outer Loop. MoPac South is a 5.5 mile freeway extension of an existing freeway, MoPac, in Austin, Texas. The Austin Outer Loop is an 84 mile circumferential freeway surrounding the City of Austin. Portions of both of these highways overlie the Edwards Aquifer, a sole source drinking water aquifer in southern Travis and northern Hays Counties, southwest of Austin. See Appendix "A." Plaintiffs, three non-profit corporations, allege that both highways have "synergistic environmental impacts" that require the highways to be the subject of an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act of 1969 ("NEPA), 42 U.S.C. §§ 4321 et seq. Plaintiffs allege that the Texas State Department of Highways and Public Transportation ("SDHPT") and the MoPac South Transportation Corporation ("Corporation") are acting to frustrate federal environmental law by characterizing the most environmentally sensitive segments of these highway projects as state projects exempt from NEPA. Additionally, Plaintiffs allege Defendant Federal Highway Administration ("FHWA") is in violation of NEPA for allowing continued federal participation in construction of MoPac and in planning for construction of the Austin Outer Loop. Plaintiffs further allege FHWA allowed the unlawful segmentation for purposes of environmental review of a single federal action, the Austin Outer Loop. Plaintiffs believe that the Defendants' failure to prepare an

EIS pursuant to NEPA will result in irreversible contamination of the aquifer causing a significant hazard to public health.

I. Factual Background

Planning for a roadway known as MoPac Boulevard began in the 1940's. The City Planning Commission of Austin, Texas prepare a transportation report in 1944 which reflected the use of the Missouri Pacific Railroad right of way for a thoroughfare. That thoroughfare, which runs north to south west of downtown Austin, approximates the existing location of MoPac Boulevard also designated as Loop 1. The concept of the MoPac roadway was developed over the next thirty years, and by 1966, U.S. 290 was planned to be the southern terminus of the highway. Extending MoPac beyond U.S. 290, where MoPac South is now being constructed, was not considered during that planning process. The existing MoPac is a highway 16 miles in length extending from FM 1325 north of Austin to U.S. 290 south of Austin. This portion of MoPac Boulevard has been operational over the entire 16-mile length for more than three years.

MoPac South was conceived as a major radial roadway serving southwest Austin south of U.S. 290 in the early 1980's. On January 11, 1984, the Austin City Council approved the MoPac South segment from U.S. 290 to a roadway planned for south Travis County. Subsequent to this approval, the planning and development of the MoPac South project began. MoPac South is planned to be an approximately 5.5 mile highway segment extending from the interchange of MoPac and U.S. 290 south to an interchange with proposed State Highway 45, the Austin Outer Loop.

The Austin Outer Loop is to be a major highway approximately 84 miles in length encircling Austin which was also conceived in the early 1980's. This highway has been

divided into five segments. The segment which is to be built in the southwest corridor of the Austin Outer Loop has been designated by SDHPT as Segment 3. See Appendix "B." Segment 3 is the portion of the outer loop which will intersect with the southern terminus MoPac South.

Both of these highways, MoPac South and Segment 3, traverse the Austin-area Edwards Aquifer. The Edwards Aquifer is a "major aquifer" in the state of Texas which covers approximately 4,350 square miles including a portion of south Travis County and Austin, Texas.[1] The Edwards Aquifer produces water from several layers of highly permeable and porous honey-combed rocks, known as "karst." Due to the extremely high permeability of these layers of rocks, wells pumping from this aquifer are among the most prolific in the world.[2] "Recharge" or addition of water to this aquifer primarily occurs by downward percolation of surface water from rivers and streams crossing the aquifer through crevices and faults in the underlying formations and secondarily by direct infiltration of precipitation on the outcrop of the karst.[3] Waters move regionally from these recharge areas to discharge at wells and naturally at numerous small and large springs. One such spring which this aquifer feeds is the "Barton Springs Pool"

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[1] Ground Water Quality of Texas--An Overview of Natural and Man-Affected Conditions, March 1989, Report 89-01, Texas Water Commission at 29. A major aquifer is defined as one which yields large quantities of useable quality water in a comparatively large area of the state. Approximately 96 percent of the ground water used in Texas in 1984 was produced from the major aquifers. Id.; see Appendix "A".

[2] Id. at 43.

[3] Id.

in Austin. Barton Springs is a natural wonder of great symbolic, recreational and economic value to Austinites.

Plaintiffs assert six claims for relief from the FHWA and the SDHPT in their Complaint. Plaintiffs' claims allege that Defendant FHWA is in violation of NEPA and the Federal-Aid Highways Act, 23 U.S.C. §§ 101, et seq.

Plaintiffs request a declaration that the Austin Outer Loop and MoPac South have environmental impacts requiring the preparation of a single NEPA EIS. Plaintiffs also seek an injunction barring any construction on or additional right-of-way acquisition for the Austin Outer Loop, or in the alternative for Segment 3, and MoPac South pending FHWA approval of a NEPA EIS.

Defendants deny the application of federal law to these two roadways which they claim are interdependent. They deny that they have arbitrarily divided the outer loop into segments to avoid federal environmental review. Both projects are asserted to be state funded projects which have been developed in accordance with all state and federal laws governing state projects. Because these projects are state funded, the Defendants claim they are not "federal actions" subject to NEPA. As an affirmative defense, Defendants claim Plaintiffs' suit is barred by laches.

II. Applicability of NEPA

The merits of Plaintiffs' relief turn on the question of the applicability of the following portions of NEPA:

> [T]o the fullest extent possible ...
>
> (2) all agencies of the Federal Government shall-- . . . (C) include in every recommendation or report on proposals for ... major federal actions significantly affecting the quality of the human environment, a

> detailed statement by the responsible official on--(i) the environmental impact of the proposed action . . . .

42. U.S.C. §4332 (1977) (emphasis added). This provision is expressly applicable to federal agencies, including the FHWA; and, pursuant to judicial interpretation, the provision is equally applicable to the construction of state highways when such construction involves "major federal action" which has a "significant affect" on the environment. Hawthorn Environmental Preservation Association, et al v. Coleman, 417 F.Supp. 1091, 1096 (N.D. Ga. 1976), aff'd per curiam, 551 F.2d 1055 (5th Cir. 1977). "Action" is defined as "[a] highway or transit project proposed for FHWA . . . funding." 23 C.F.R. § 771.107(b). "It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds." Id. "Major federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18[4]

The fundamental purpose of NEPA is to compel federal decision makers to consider the environmental consequences of their actions. Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1344 (5th Cir. 1979). The thrust of section 102(2)(c) of NEPA quoted above is that environmental concerns be integrated into the very process of agency decision-making. Andrus, 442 U.S. at 350.

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[4] This regulation is one of the regulations issued by the Council on Environmental Quality ("CEQ") to implement the procedural provisions of NEPA. CEQ regulations are entitled to "substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

Both federal and state Defendants maintain that the MoPac South and Segment 3 projects are neither federal-aid highway projects nor "federal actions" under NEPA. Because the Defendants consider both projects to be state undertakings, the Defendants argue that no federal EIS is needed. Therefore, the question which must be answered as to both of the roadways, is whether the projects involve "major federal action" as that term is applied under NEPA. Each project will be considered separately.

A. Segment 3 of the Austin Outer Loop

On October 29, 1984, the Travis County Commissioner's Court passed a resolution requesting the County of Travis, City of Austin and the SDHPT to act through the Austin Transportation Study Advisory Commission to consider the preliminary alignment and travel demand for an 82-mile, limited-access outer parkway encircling the city of Austin.[5] On March 21, 1985 a delegation of local officials appeared before the State Highway and Public Transportation Commission requesting construction of an outer parkway around Austin. On May 22, 1985, the State Highway Commission issued a Minute Order designating a state highway encompassing the City of Austin. The commission agreed to proceed with project planning of the highway including environmental reports. The commission also stated that the "... Parkway [Austin Outer Loop] will be developed in segments according to need and available funding; [t]he segments developed by the Department will be financed with Federal-aid funds whenever

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5 The William County Commissioners, the cities of Cedar Park, Manor, and Pflugerville all passed similar resolutions in March of 1985 endorsing the concept of a limited access parkway designed to loop the Austin metropolitan area.

possible.[6] The outer loop became a major feature of the Austin transportation plan in early 1986.[7]

As part of the planning process, SDHPT prepared an "overview environmental assessment" of the outer loop and submitted it to the FHWA in early 1987 for its approval. The state indicated that a "draft environmental impact statement" was appropriate, and acknowledged that this project may be added to the "Federal Secondary System."[8] Soon after SDHPT so informed FHWA, the FHWA published a Notice of Intent in the Federal Register on August 25, 1987. This notice announced to the public that an EIS would be prepared for each of four segments of a proposed highway project in Hays, Travis and Williamson Counties, Texas.[9] In this notice the FHWA states, "Federal funds will be used to finance project construction in each of the

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[6] SDHPT Minute Order, No. 83158, May 22, 1985.

[7] The entity officially responsible for transportation planning of the Austin area is the Austin Transportation Study Policy Advisory Committee ("ATSPAC") and is the entity that so designated the outer loop. The ATSPAC is a 17-member committee, the composition of which is determined by agreement of the SDHPT, the City of Austin and Travis County. A majority of the committee is state senators, representatives or employees. The chief executive officer of the SDHPT district in which Austin is located is a member of the ATSPAC.

[8] Letter dated January 14, 1987 from Frank Holzmann, Chief Engineer Highway Design, SDHPT, to John Conrado, Division Administrator, FHWA.

[9] Federal Register , Vol. 52, No. 164, Tuesday, August 25, 1987.

segments.[10]

On September 10, 1987, the SDHPT re-segmented the outer loop, dividing Segment 3 into Segments 3A and 3B, and at some point, SDHPT designated Segment 3A as a state-funded project.[11] The SDHPT re-segmented the outer loop several times and each time submitted the proposed segmentation to the FHWA for review. The FHWA expressed concern about the proposed segmentation by the state, and the state continually attempted to propose segments which would meet FHWA standards. As late as February 28, 1989, the FHWA was still working with the SDHPT to make certain the segments met certain requirements to permit the state to remain eligible for federal funds. At that time,

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10 Id.; In October 1987, the FHWA was still representing to the public that it was preparing federal environmental studies on the outer parkway as illustrated by FHWA's District Engineer, Gamaliel E. Olvera's, letter to the Travis Audubon Society. In that letter, Mr. Olvera says, "As the lead Federal agency for the preparation of the Environmental Impact Statements for the proposed Austin Outerparkway [sic], we can assure you that Federal laws and regulations regarding threatened and endangered species will be followed."

11 Segments 3A and 3B were eleven and fourteen mile segments of the original Segment 3 which did not have terminus at any roadway but simply connected to the remainder of the outer loop.

The Court finds no evidence of official action by SDHPT designating Segment 3 as state funded; however it must have been so designated sometime between October, 1987 and December, 1988. John J. Conrado, Division Administrator for the FHWA, wrote to the Barton Springs-Edwards Aquifer Conservation District (on December 21, 1988) thanking it for its concern, but since the SDHPT has chosen not to use federal funding for Segment 3A, the FHWA refuses to comment on the environmental consequences resulting from the design of this segment.

FHWA proposed that the project be divided into five segments which would all end at major radial roadways, and the SDHPT accepted this proposal. This segmentation is the current division of the outer loop, and the only segment planned for state funds is Segment 3. See Appendix "B".

During the years 1987, 1988 and 1989, SDHPT planned and is planning to use federal funds to help build the outer parkway.[12] The most recent status report, dated September 23, 1989, reflects that each segment of the outer loop, except Segment 3, is headed for some federal funding. This status report also shows that the only segment under construction is Segment 3. Construction on Segment 3 began December 12 or 13, 1989.[13]

The SDHPT's principal argument against the applicability of NEPA to Segment 3 is that no federal funding has been requested for any of the segments of the outer loop. However, SDHPT concedes that the SDHPT is retaining eligibility for federal aid funds.[14] SDHPT has contended

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12 In each Transportation Improvement Program drafted by the SDHPT for years 1987, 1988 and 1989 the Austin Outer Loop is planned to be construed with funds to be supplied by the FHWA.

13 Segment 3 has been the first portion of the outer loop to go to construction despite earlier planning of the SDHPT which prioritized Segment 4, first; Segment 1, second; and Segment 3, third in June 1986.

14 In addressing the Austin City Council on April 13, 1989, SDHPT spokesperson, Roland Gamble said:

> We are not passing up any federal funds. The Highway Department does not operate on a grant system. There are not funds designated for any particular project. It's as if you pour all those projects in a funnel, and up at the top you have got more projects than will ever come out the bottom.

throughout this litigation that federal funding is an absolute prerequisite to federal action within the meaning of the NEPA. However, as this Court has stated before, whether a project is a major federal action does not turn entirely on the question of funding.

The state may not disregard otherwise applicable federal environmental requirements solely on the basis of the funding question. Hawthorn, 417 F.Supp. at 1099. The absence of federal funding will not excuse noncompliance with NEPA requirements if the highway projects in issue are found to be segments of an overall federal construction project. Id. The state cannot subvert national environmental policy by shifting federal funds from an authorized project to avoid the ramifications of NEPA's commands. Named Individual Members of the San Antonio Conservation Society, et al v. Texas Highway Department, 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 701 U.S. 933 (1972).

On the other hand, "[i]t has been held consistently that the prospect of future federal funding does not make a project 'major federal action' for NEPA purposes during the planning stage." Macht v. Skinner, 715 F.Supp. 1131, 1134 (D.D.C. 1989). Therefore, the question is at what point

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> and when they come out the bottom, state or federal funds are utilized on [the] projects. When they come out the bottom and go to contract, sometimes they are funded with state funds. For some reason early on we decide that some projects should be state-funded, and then they go all the way through as a state-funded project. ... And so the fact that we are not spending federal funds on Segment 3 does not mean the state loses any federal funds. They still get the same amount of federal funds, and those funds will just go to other projects statewide. That's whey the Highway Commission started out and said it had the discretion--prerogative-- to make those things balance to the best interest of the State of Texas.

does a project become significant enough to be considered federal for the purposes of NEPA. The mere prospect of future federal funding is not enough, yet actual funding is not the deciding factor either.[15]

The Code of Federal Regulations prescribes the policies and procedures of the FHWA for implementing NEPA as well as the regulations of the CEQ, 40 C.F.R. Parts 1500-1508. 23 C.F.R. § 771.101. Further, these regulations set forth all FHWA requirements under NEPA for the processing of highway and urban mass transportation projects. Id. Section 711.113, titled "Timing of Administrative Activities," states that the FHWA will perform the work necessary to complete an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. However, some of the activities shall not proceed until certain conditions set out in this section have been met. Id.

Plaintiffs argue that FHWA's own interpretation of its regulations and this section regarding the timing of NEPA activities should determine at what point a project becomes subject to NEPA. FHWA has published its interpretation of Section 771.113 in the Federal Register. 52 Fed. Reg. 32649, August 28, 1987. In its interpretation, FHWA states that Section 771.113 places limits on the actions which FHWA may take to develop a project prior to the completion of the NEPA process:

> This limitation on actions supports one of the primary purposes of NEPA--that Federal agencies consider environmental effects fully, including alternative courses of action, before

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15 The Fifth Circuit has previously acknowledged that the law on this point is unclear. See e.g. Hawthorn, 417 F.Supp. at 1096; see generally Named Individuals Members, 496 F.2d 1017 (5th Cir. 1974).

> reaching a decision to proceed with major Federal Actions.
>
> * * *
>
> It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed.

Id. (emphasis added).

FHWA's interpretation of its own regulation forms the crux of Plaintiffs' argument for the application of NEPA. Plaintiff argues that the Austin Outer Loop is a larger project subject to federal environmental review of which Segment 3 is an integral part. Therefore, Plaintiff argues, this segment should be enjoined from further construction pending a final EIS on the entire loop.

Despite the above quoted regulation, the SDHPT continues to contend that since it has not asked for federal funding, this project is not subject to NEPA. A SDHPT Engineer, Mr. Billy Rogers, testified at trial that the state does not obligate itself to any federal regulations until the state has requested federal money pursuant to 23 U.S.C. § 105.[16]

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16 23 U.S.C. § 105 states that any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program of proposed projects for the utilization of the funds

Since none of these segments have been listed as a "105 Program" the State sees no obligation to comply with NEPA.

The witness offered by the FHWA to testify on this point was Peter Lombard, the Director of Program and Planning for FHWA. Mr. Lombard also stated a "proposal" for federal action as referenced in NEPA is a project for which a state has requested funding. He testified that only federal funding makes an action a "major federal action." Mr. Lombard offered no explanation for the difference between his interpretation of federal regulations and that interpretation published by his own agency in the Federal Register quoted above.

If a project became subject to NEPA only upon a request for funding pursuant to Section 105, the Court believes the FHWA's regulations would so state. Instead, Section 771.111, C.F.R., states:

> (b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action. ... [T]his is normally no later than the review of ... the approval of the 105 program (23 U.S.C. § 105).

(emphasis added). The language of this section indicates that the FHWA may take action from an unidentified point in time up to the time the project is approved pursuant to Section 105. No section of the regulations states that FHWA only becomes involved upon request of funding, and this conclusion is consistent with the policy of NEPA already discussed. Further, "major federal action" is defined in 40

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apportioned. The Secretary shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

C.F.R. Section 1508.18 as an "action with effects that may be major and which are potentially subject to Federal control and responsibility.[17]

In support of Plaintiffs' argument, they point out that all of the other segments of the Austin Outer Loop, Segments 1, 2, 4 and 5 are headed for some federal funding.[18] Mr. Billy Rogers, SDHPT engineer, testified that the state is anticipating receiving some federal money for the remaining segments. The estimated cost of the Austin Outer Loop is estimated to be somewhere between 400 and 800 million dollars. Mr. Rogers testified that at this price such a project would "not likely" be funded by the state alone.

The Defendants have maintained throughout this litigation that the Austin Outer Loop was not conceived as one project nor were the segments being proposed, planned, designed, or constructed as one project. However, the evidence does not support this contention. From its inception, the Segments have been considered exactly that, "segments" of a greater project. In fact, when the SDHPT first segmented the loop, the segments did not begin and end at major radial roadways. Only at the FHWA's insistence did SDHPT divide the loop at major radials. Each segment of the Austin Outer Loop therefore must be considered an

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17 This section of the regulations is titled "Terminology and Index" which is to be used specifically by the CEQ, but generally by the Federal Government. 40 C.F.R. §§ 1508.1 et seq.

18 The September 23, 1989 "Current Status Report" on the Austin Outer Parkway shows that the draft environmental impact statement on Segment 1 has already been submitted to FHWA. It shows the draft EIS on Segment 4 will be submitted to FHWA, and it shows FHWA submission is anticipated for the EIS's on Segments 2 and 5. It also shows Segment 4 is in the Section 7 consultation process under the Endangered Species Act.

integral part of the larger project. The Court acknowledges the fact that the SDHPT has not requested any federal aid for any section of the Austin Outer Loop. However, the probability of a request for federal funding is too great to allow the SDHPT to construct one portion of the loop without following federal law; otherwise, a prospective applicant could always circumvent NEPA by designating a portion of a larger project as state funded without affecting its eligibility for federal funds for the remaining portion.[19]

Additionally, SDHPT's motive for segmenting the portion of the loop which traverses the area most environmentally sensitive is naturally suspect. SDHPT did not originally plan for Segment 3 to be constructed first. Also, the Court finds no evidence of when and why Segment 3 was designated for state funds only. SDHPT's only stated reason has been that the state has that discretion. Further evidence of SDHPT's desire to avoid federal environmental law is the fact that construction on Segment 3 began in December, 1989 after SDHPT knew of the trial date in this case. Therefore, the Court is of the opinion that the Austin Outer Loop is a "proposal for major federal action" subject of an environmental document, and further that Segment 3 cannot be "segmented" from the overall proposal and funded separately before the environmental process pursuant to NEPA on the entire loop is completed.

B. MoPac South

South of Slaughter Lane, MoPac South has been

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[19] See Hawthorn, 417 F. Supp. at 1101-02 (N.D. Georgia), where the Court states "the prospects of its becoming a 'major federal action' are sufficiently great to warrant treating it as sufficiently federal for purpose of applying unified environmental standards to the entire project."

planned for construction simultaneously with the first leg of Segment 3 of the Austin Outer Loop because MoPac South "would otherwise have no logical connection with other existing roadways in the southern section of Travis County.[20] Since MoPac South has been planned for construction as a part of Segment 3 which this Court has found to be an integral part of a federal project, MoPac South must necessarily be an integral part of a federal project and subject to NEPA.

III. Laches

Three independent criteria must be met before laches can be invoked to bar litigation, and the burden of proof is placed on the party asserting the defense of laches. Mutual Life Insurance Co. of New York v. Bohart, 743 F.2d 313, 326 (5th Cir. 1984). "The defendant must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." Save Our Wetlands, Inc. v. United States Army Corps of Engineers, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977); Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 478 (5th Cir. 1980). Whether laches bars an action in a given case depends upon the circumstances of that case and is "a question primarily addressed to the discretion of the trial court." Gardner v. Panama R. Co., 342 U.S. 29, 30 (1951). The applicability of the doctrine to environmental litigation is no longer open to doubt. Environmental Defense Fund, 614 F.2d at 478.

The defense of laches is available in environmental

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20 The development of MoPac South and Segment 3 as one project was announced by the Corporation and published by the FHWA in its publication "Highway Financing Briefs" dated January 1988.

litigation but is disfavored because of the public interest in environmental quality and compliance with Congress' environmental policy. Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101, 1118 (N.D. Tex. 1985). A laches defense in environmental cases has succeeded only where a substantial portion of the project has been completed at the time the suit was filed. Id. at 1119.

A. A Delay in Asserting a Right or Claim

This Court has already found that Plaintiffs did delay asserting their claims; therefore, this issue will not be discussed.[21] Next, the Court will consider the final two elements of the laches defense as they relate to Segment 3 and MoPac South respectively.

B. Excusable Delay and Undue Prejudice to Defendants

1. Segment 3

Defendant Corporation argues that "Plaintiffs' entire case on Segment 3 focuses on one feature--segmentation."[22] Therefore, Defendant contends Plaintiffs should have challenged the outer loop segmentation when the proposed segmentation was made public in August of 1987. Defendant Corporation further contends the FHWA regulations require administrative steps which are designed to provide quick and accurate notice to interested persons, and if Plaintiffs had

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21 Order dated December 8, 1989 at 5.

22 MoPac South Transportation Corporation's Written Closing Argument (J.B. Ruhl) at 13.

simply inquired as to why these procedures were not being followed, they would have quickly discovered that the environmental reviews being conducted were not prepared pursuant to federal law.

The "Notice of Intent" was published by the FHWA in October of 1987 informing the public that EIS's would be prepared on all four segments of the outer loop. As this noticed indicated, the state did begin to prepare EIS's on all four segments. However, the statement being prepared on Segment 3, then Segment 3A, was different from the others. The Segment 3A EIS was a "state" EIS--not one prepared pursuant to federal law. Although a draft of this statement was released by SDHPT in November 1988, but the draft gave no indication that it was anything other than a federal EIS.[23] Further, SDHPT continued to show Segment 3 as a federally funded project on its Transportation Improvement Program and Annual Element for the years 1987-88, 1988-89, and 1989-90.

Mere negligence to challenge an action is not sufficient to establish laches in any case. Environmental Defense Fund, 614 F.2d at 479. The Defendants must show that those

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23 A public hearing was held on November 3, 1988 on Segment 3A which SDHPT argues Plaintiffs neglected to attend. However, the agenda of that meeting makes no mention of the fact that the EIS being discussed was not being prepared pursuant to federal law. Additionally, no evidence was presented that State regulations or rules regarding the preparation of EIS's exist, so Plaintiffs were safe to assume that the EIS was being prepared according to federal rules.

Defendants argue that it was openly apparent as early as June of 1988 that construction was proceeding with state and private funding. However, Plaintiffs produced a letter dated June 3, 1988 from Roland Gamble, District Planning Engineer of SDHPT, to a real estate firm that inquired about the status of the loop. In that letter, Mr. Gamble details the environmental review process but makes no mention of a state and federal process.

whom it seeks to bar by invoking laches were or should have been aware of the questionable nature of the government's activity. Id. Along those lines, when government action is involved, members of the public are entitled to assume that public officials will act in accordance with the law. Id.; Save Our Wetlands, 549 F.2d at 1027-28; Clark v. Volpe, 342 F.Supp. 1324, 1328-29 (E.D. La. 1972), aff'd per curium 461 F.2d 1266 (5th Cir. 1973).

When Plaintiffs did begin to inquire about the status of the environmental review process in early 1989, their efforts were thwarted by both the federal and state Defendants. The SDHPT advised its staff by memo dated May 11, 1989, that they were to give no information to Save Barton Creek Association regarding scheduling. FHWA refused Plaintiff's Freedom of Information Act requests on June 30, 1989, claiming that SDHPT was acting as a "consultant" in preparing the EIS's for purposes of NEPA. The parties have stipulated that no officer or director of any of the Plaintiff organizations, prior to November 1988 had actual knowledge that Segment 3A Draft EIS was not a NEPA document. Not until August 1989 did Plaintiffs learn that Segment 3 was state funded.

In light of the above facts, the Court finds that Defendants have failed to uphold their burden to show Plaintiffs should have been aware of the questionable nature of the SDHPT's activity. The public should not be required to assume the law is not being followed and investigate. Yet, when Plaintiffs did investigate they were immediately turned away by SDHPT. SDHPT's intentions regarding Segment 3 may have been on the "up and up"; however, the evidence does not reveal any measurable good will on the State's part. Barring Plaintiffs' claim by laches would be inappropriate for that reason alone considering the equitable nature of the defense.

Finally, Defendants have very little room to claim

undue prejudice from Plaintiffs' delay in filing suit considering construction of Segment 3 did not begin until December 1989.[24]

2. MoPac South

An abundance of evidence has been presented throughout this litigation regarding Plaintiffs' diligence, or lack thereof, regarding claims on MoPac South. Essentially, the Defendants contend Plaintiffs' suit was ripe in 1986 and if Plaintiffs were not, in fact, aware of funding on MoPac South, they should have been. Plaintiffs contend, however, that Defendants deceived them and their deception prevented Plaintiffs from filing suit earlier. The evidence clearly shows, however, that, the State decided to proceed with exclusively state funding in October of 1986. Thereafter, the State was forthcoming and unambiguous about its plans regarding MoPac South.[25] Plaintiffs never inquired as to the

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[24] Mr. Thomas Word, an engineer with SDHPT, testified that Segment 3 is approximately 10% complete measured in dollars spent as compared to dollars budgeted.

Also worthy of note is that on September 16, 1989, SDHPT's designated representative for its deposition did not know when construction bids for the first work on Segment 3 would be requested. The first construction work began December 12 or 13, 1989.

[25] The draft EIS and the status of MoPac South were the subject of several public meetings. Notice of these meetings was published in the Austin American Statesman and posted with local, county and state officials. These meetings were being held as early as the latter part of 1986. An officer of Plaintiffs' organizations attended a December, 1986 public hearing and expressed his intention to thoroughly review the draft EIS and submit any comments or concerns regarding that document. Plaintiffs never submitted such comments.

funding status or environmental review procedures of MoPac South nor did Defendants misstate the funding sources or environmental review procedures being used.[26] Therefore, Plaintiffs' delay borders on the line of being inexcusable; however, the Court will not resolve this dispute. Rather, the Court will focus on whether the prejudice to Defendants is undue simply because the potential harm to Defendants is so great if Plaintiffs prevail on their claims regarding MoPac South.

Commencement of construction on MoPac South was announced in an article appearing in the April 28, 1988 issue of the Austin American Statesman, and construction began soon thereafter.[27]

As of this date, construction of MoPac South from U.S. 290 to Slaughter Lane is 96% complete, and construction of MoPac South from Slaughter Lane to Hannon Lane is 42% complete.[28] The SDHPT has expended over $10,000,000 in the construction of MoPac South, and the Corporation has by its efforts donated over $10,000,000 worth of right-of-way and services to the State for MoPac South. Additionally, local governments have expended

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[26] Plaintiffs have argued throughout that Defendants' deception regarding MoPac South kept them from discovering the true nature of the EIS being prepared. However, Defendant Corporation makes a point in its written closing argument which is well-taken: "If indeed they [Plaintiffs] did think MoPac South was undergoing NEPA review, why did they never avail themselves of numerous opportunities to comment on the adequacy of the environmental impact statement?" Written Closing Argument at 7.

[27] Despite gap, extension of MoPac begins, Austin American Statesman, April 28, 1988.

[28] Testimony of Thomas Word, SDHPT engineer.

substantial funds to develop infrastructure to be used in southwest Travis County based on the assumption that MoPac South would be available for traffic use in 1990.

The Court acknowledges the futility of enjoining the construction of MoPac South from U.S. 290 to Hannon Lane. However, construction of MoPac South from Hannon Lane south to the proposed intersection with Segment 3 is not yet under way. Since MoPac would not have a road to otherwise intersect if construction of Segment 3 is enjoined, Defendants will not be unduly prejudiced by Plaintiffs' delay.[29] Therefore, laches will bar Plaintiffs' claims regarding MoPac South from U.S. 290 to Hannon Lane because the delay, whether excusable or not, results in great prejudice to Defendants. However, any claims regarding the final leg of the project, from Hannon Lane South, will not be barred.

VI. Remedy

The normal remedy afforded by the courts for a NEPA violation is an injunction prohibiting construction and maintaining the status quo until the agency has complied with the statutorily required procedures. Richland Park Homeowners Association v. Pierce, 671 F.2d 935, 941 (5th Cir. 1982).[30] An injunction of the federal action at issue is often appropriate but should be limited by general equity principles. Environmental Defense Fund, 651 F.2d at 1005-

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[29] Defendant Corporation acknowledges that the final phase of MoPac South is "very much influenced" by construction of Segment 3.

[30] But see Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988) where court held that NEPA does not mandate an injunction; see also Amoco v. Village of Gambell, 480 U.S. 531 (1987).

06. To allow additional investment in a particular course of action prior to completion of the NEPA process tends to undermine the role of the NEPA alternatives analysis in the agency decision-making process. One beneficial effect of such injunction is to maintain the status quo so that the relevant decision makers and the public may still have the opportunity to choose among alternatives, as required by NEPA. Id. Another purpose is to provide the agency with an incentive to comply with NEPA in as rapid and thorough a manner as is reasonably possible. Id.

Defendants first argument against an injunction is that the roadways will relieve traffic congestion in southwest Travis County and benefit the public health and welfare. However, Defendants' exhibits clearly show that south of Slaughter Lane the vast majority of the area surrounding MoPac South is undeveloped. Defendants next argue that the roadways are already under construction at great cost to SDHPT. This may be true, but again Defendants were aware of the risk they were taking when they began construction on Segment 3 after this lawsuit was filed.

Next, Defendants argue that requiring the completion of an EIS on Segment 3 would have no effect because the State has already chosen not to seek federal funding, and is probably no longer eligible for funding. Perhaps the State has foregone its chance of receiving federal money to construct this segment, but, as already stated, funding alone does not determine whether federal environmental law applies. Defendants also warn of the probability of future litigation over the proper procedures; however, the threat of future litigation should not preclude injunctive relief.

Finally, Defendants contend that the secondary development effects of the roads will be controlled by local regulations, such as the existing Comprehensive Watershed Ordinance and proposed Texas Water Commission regulations, so an injunction is not necessary to ensure such

controls are put in effect. Hence, an injunction is not needed and would do more harm than good.[31]

Instead, the Corporation suggests that the Court "could fashion a supplemental EIS requirement for the State to satisfy and track through the FHWA review and public comment procedures within a time frame specified by the Court."[32] SDHPT also argues that Plaintiffs are not entitled to injunctive relief because they have never been able to quantify any harm to the aquifer.

Plaintiffs urge this Court to issue an injunction to halt

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[31] Defendants spent a lot of time at trial presenting the Court with evidence of the protections already provided by the Comprehensive Watershed Ordinance and proposed Texas Water Commission regulations.

The Watershed Ordinance, No. 860508-V, was established pursuant to Texas Legislature directive that every city with a population of 5,000 or more shall establish a water pollution control and abatement program. Texas Water Code, Section 26.117(a).

The City of Austin, through its Amicus Curiae Brief, has informed the court that many of the municipal utility districts about which Defendants spoke so highly are grandfathered from the Comprehensive Watershed Ordinance which is applicable in Austin's Extra-Territorial Jurisdiction. Further, the City argues that the Comprehensive Watershed Ordinance will not fully explore the environmental consequences of the construction of the southernmost extension of MoPac and Segment 3 as an EIS would. See Supplement to City of Austin Amicus Curiae Brief at 5-11.

Additionally, the Court finds it interesting that the Austin City Council instructed its City Attorney to file an amicus curiae brief, strongly urging this Court to enjoin the construction of these projects, which have been planned and sought by other "city fathers" for almost one-half a century.

[32] MoPac South Transportation Corporation's Written Closing Argument (J.R. Ruhl) at 18.

construction on MoPac South south of Slaughter Lane and Segment 3 citing the risk of contamination to the aquifer and the risk of destruction of habitat for endangered species. Evidence offered by both parties at trial revealed the sensitivity of the aquifer and the surrounding environment, thereby making the granting of an injunction the most appropriate remedy.

This Court cannot practically determine what environmental studies need to be conducted on these projects as the Corporation suggests. The Court trusts that the federal law is clear on a requirements of the NEPA EIS, and that federal environmental law will define what necessary work needs to be done. Furthermore, SDHPT must be aware of and very familiar with the requirements of a federal impact statement considering the fact that the four remaining segments of the outer loop are currently in the environmental review process.

Plaintiffs also request that this Court order one EIS be prepared for MoPac South and the Austin Outer Loop citing the U.S. Supreme Court case of Kleppe v. Sierra Club, 427 U.S. 390 (1975). Kleppe stands for the proposition that NEPA may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. Id. at 409. When actions will have a cumulative or synergistic environmental impact upon a region and those actions are pending concurrently before an agency, their environmental consequences must be considered together. Id. at 410; see also 40 C.F.R. § 1508.25.

Kleppe goes on to say, however, a "regional environmental impact statement" will be prepared unless a previous EIS has sufficiently analyzed the impacts of the proposed actions. Id. at 411 (emphasis added). The determination of the region with respect to which a comprehensive statement is necessary requires a high level of technical expertise and is properly left to the informed

discretion of the responsible federal agencies. Id. Absent a showing of arbitrary action, the Court must assume the agencies have exercised this discretion appropriately. Id.

In this case, the SDHPT has submitted EIS's on the remaining four segments and at no point has the FHWA instructed SDHPT to prepare a regional EIS. The decision to prepare separate statements is better left to the experts. This Court is not in the position to decide whether the entire loop should be considered in one statement. Rather, SDHPT will be ordered to prepare an EIS on Segment 3 just as it has on the remaining four segments. Accordingly,

IT IS ORDERED that Defendants FHWA and SDHPT, and Defendant-Intervenor MoPac South Transportation Corporation, their employees, agents, consultants and contractors are hereby enjoined from any and all construction and development activities on (1) the Austin Outer Loop, (2) Mopac South south of Hannon, until such time as the procedures provided under the National Environmental Policy Act for major federal action significantly affecting the environment are completed.

IT IS FURTHER ORDERED that additional surveying or preliminary engineering work on the Austin Outer Loop prior to completion of the National Environmental Policy Act procedures shall be strictly limited to that which is necessary to evaluate potential impacts of the proposed project and any alternative alignments or proposals.

IT IS FURTHER ORDERED that until such time as the above required procedures are completed, Defendant SDHPT shall undertake the following interim measures to protect the existing environment from runoff from construction already initiated on MoPac South and F.M. 1926:

(a) stabilize all construction areas, using berms or double rows of filter fences where necessary, so that no sediment or other construction pollutants may exit presently

disturbed areas;

(b) revegetate any cleared but not yet paved areas using native grass mix (exotic grasses like King Ranch bluestem should not be used). In revegetating, chemical hydromulch should not be used, nor should fertilizers be used beyond the minimum necessary to allow initial establishment of grasses.

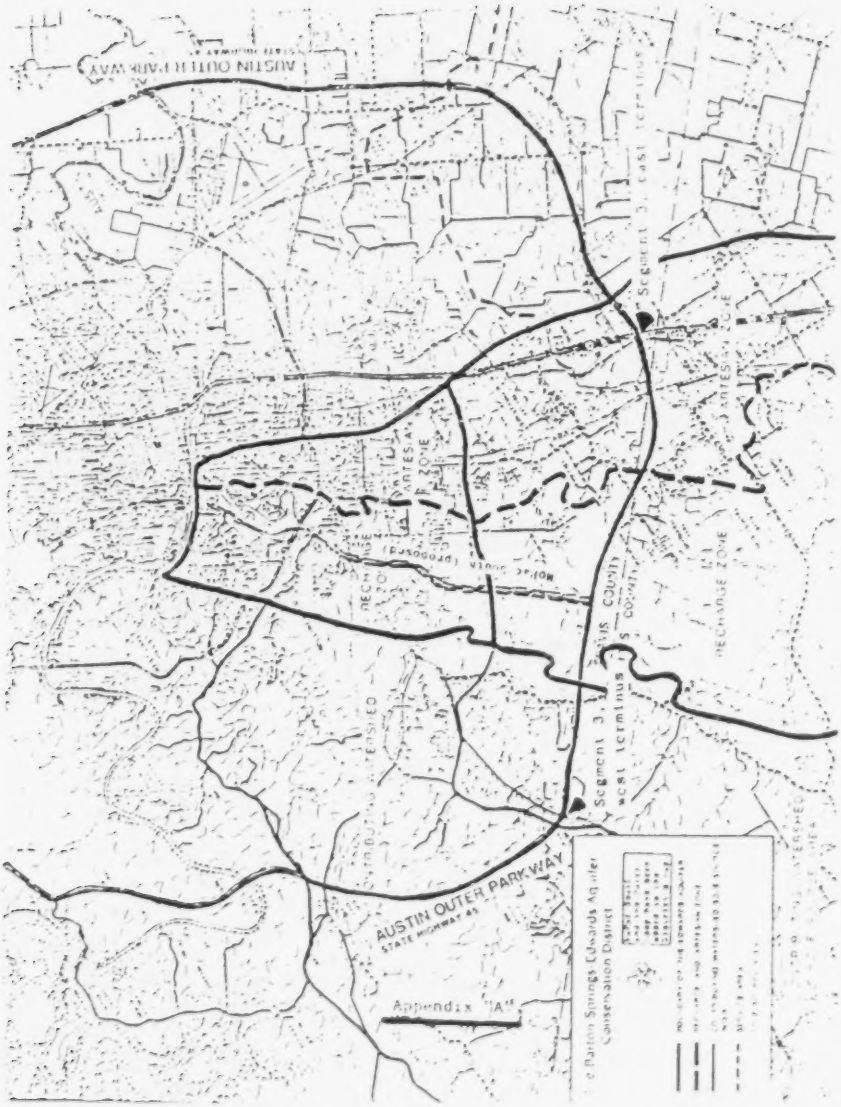
(c) Regularly maintain berms, filter fences, and all other sedimentation controls in order to insure that no sediment or construction pollutants exit the site. All temporary sedimentation control measures should be inspected and, if necessary, repaired or replaced, immediately following any rain of more than 0.20 inches.

(d) All construction related or other chemical products, hazardous or non-hazardous, shall be removed from the above-described project sites.

IT IS FURTHER ORDERED that the Plaintiffs submit an affidavit of attorney's fees within twenty (20) days of entry of judgment in accordance with Local Rule 300-9.

SIGNED this 6th day of March, 1990

/S/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE


AUSTIN OUTER PARKWAY
STATE HIGHWAY 45
Segment 3 west terminus
Segment 3 east terminus
RECHARGE ZONE
Appendix "A"

Appendix "B"

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action A-89-CA-719

(April 5, 1990)

SAVE BARTON CREEK ASSOCIATION, WE CARE AUSTIN and AUSTIN CROSSROADS,
Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Defendants,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,
Intervenor.

ORDER

Came on this day to be considered Plaintiffs' Rule 52(b) Motion and Brief for Additional Fact Findings and Plaintiffs' Rule 59(e) Motion and Brief to Amend Judgment. Plaintiffs request four additional fact findings and

amendments to the Memorandum Opinion and Order and the Judgment entered on March 6, 1990.

Plaintiffs first request that the first full paragraph on page 29 be amended so that its introductory clause reads:

> IT IS FURTHER ORDERED that until such time as the above required procedures are completed, Defendant SDHPT shall undertake the following interim measures to protect the existing environment from runoff from construction already initiated on MoPac South south of Hannon Lane and on the Austin Outer Loop from its proposed intersection with MoPac South to FM 1826:

The Defendants, with the exception of the FHWA who requests the denial of all of Plaintiffs' amendments, agree that this change should be made, so this request will be granted. Accordingly,

IT IS ORDERED that the first full paragraph on page 29 of the Court's Memorandum Opinion and Order and the first introductory clause to the last paragraph on page 1 of the Judgment are so amended.

Second, the Plaintiffs request that crushed limestone which has been laid east of F.M. 1826 on the Outer Loop be "penetrated to allow moisture migration and be covered with topsoil and revegetated." The SDHPT recognizes that the area in question cannot be maintained in its current state because to do so would result in "degradation of the compacted base and an increased potential for erosion." However, SDHPT argues that revegetation of the area is not feasible because moisture from the natural ground surface will not be able to reach the vegetational root systems underlying the stone base bed. SDHPT maintains the best way to stabilize this portion of the construction area is to

place a seal coat, which is a thin spray of asphalt binder covered with clean rock, over the base already in place. The Court agrees that this would be keeping with the Court's finding that all construction areas be stabilized; therefore, Plaintiffs' second request **DENIED**.

Third, Plaintiffs have moved the Court to amend its Order and Judgment to state that laches only bars Plaintiffs' claims regarding the 1991 phase of MoPac South from U.S. 290 to Hannon Lane, and not the 2006 phase. Defendants argue that the Court correctly barred Plaintiffs' NEPA claims for the MoPac South roadway north of Hannon Lane, thereby precluding any attempts by Plaintiffs to impose NEPA on SDHPT for that portion of road, regardless of the "phase" of construction. The Court was unaware of the "phased construction" of MoPac South, and never intended to differentiate between the 1991 and the 2006 phase. Therefore, this request for amendment is also **DENIED**.

Finally, Plaintiffs suggest the following addition to the Court's finding that MoPac South is subject to NEPA:

> MoPac South is further subject to NEPA because the project is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290 and the Austin Outer Loop), and it lacks substantial independent utility. See Hawthorne, 417 F.Supp. 1091; Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 440 (5th Cir. 1981).

Defendants believe such an amendment would be improper, and would be an error of fact. The Court disagrees, and this request will be granted. Accordingly,

IT IS ORDERED that this sentence be added to the conclusion of paragraph II.B., page 17 of the Memorandum

Opinion and Order.

SIGNED this 5th day of April, 1990.

/S/ / Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8036

SAVE BARTON CREEK ASSOCIATION,
WE CARE AUSTIN and AUSTIN CROSSROADS,

Plaintiffs-Appellees and Cross-Appellants

versus

FEDERAL HIGHWAY ADMINISTRATION (FHWA)
and TEXAS STATE DEPARTMENT OF HIGHWAYS
and PUBLIC TRANSPORTATION,

Defendants-Appellants and Cross-Appellees,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,

Intervenor-Defendant and Appellant-Cross-Appellee.

Appeals from the United States District Court for the

Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 1-17-92, 5 Cir., 198_, ___F.2d___)

(February 24, 1992)

Before WILLIAMS and BARKSDALE, Circuit Judges.*

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ J.S. Williams
UNITED STATES CIRCUIT JUDGE

*Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992, and, therefore, did not participate in this decision. This matter is being decided by quorum.

DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Urban Mass Transportation Administration

Section-by-Section Analysis of
Environmental Impact and Related Procedures
(52 Federal Register 167 [pp.32,646, et seq. - 8/28/1987])

Section 771.113 Timing of Administration Activities.

This section describes the timing of various project development activities in relation to the completion of the environmental process. It places limits on the actions which the Administration and the applicant may take to develop a project prior to the completion of the NEPA process.

The language in paragraph (a) supports, and should be read in conjunction with, section 1506.1 of the CEQ regulations, "Limitations on actions during NEPA Process." These provisions ensure that the Administration's decision whether to implement an alternative under consideration in the environmental document will not be influenced by a previous commitment to a particular course of action. As such, the strictures apply not only to the Administration and applicants, but also third parties acting under a contractual agreement. Furthermore, the Administration or the applicant cannot prematurely enter into a contract which irrevocably binds it to the future performance of this work. This limitation on actions supports one of the primary purposes of NEPA - that Federal agencies consider environmental effects fully, including alternative courses of action, before reaching a decision to proceed with major Federal actions.

The wording in this paragraph has been revised to make clear the kinds of activities that will be allowed prior to

the completion of the NEPA process. This will include any impact studies and engineering work needed to complete the environmental document. Normally, preliminary design will provide all the project information needed to satisfy environmental requirements. In certain cases, more detailed design work will be needed to satisfy a specific environmental requirement and this additional design work is allowed. This paragraph has also been changed to expand on the kinds of activities which may not occur prior to completion of the NEPA process.

[1]

It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed. Segmentation of a project might involve the early acquisition of property or the purchasing of rolling stock, construction materials, or other equipment needed during the construction phase. Segmentation could also entail separate development by the applicant of an entire portion of a project. e.g., a segment of highway or transit guideway that should be considered as part of a larger project for which Federal assistance is being sought.

A number of commenters suggested revisions to his section to permit the applicant to proceed with final design activities after the receipt and evaluation of comments on the draft EIS and prior to approval of the final EIS. The

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1 The box around this paragraph is Petitioners'.

commenters contended that the EIS approval process delayed the start of final design work and, therefore, induced delays in all subsequent phases of the project development process. They suggested that if no environmental concern were raised during the draft EIS circulation period, final design of the preferred alternative should be allowed to proceed. The Administration has carefully considered these comments and continues to believe the environmental process must be completed and the EIS approval made before it is in a position to permit the applicant to proceed with final design activities. We recognize the need to develop preliminary designs in order to more accurately assess impacts in the environmental document. However, granting approval to proceed with final design at this stage would be a premature commitment to one alternative at a time when other alternatives, including the alternative of taking no action, are still being actively considered by the Administration in the environmental process.

However, the Administration recognizes the need to proceed with detailed design activities where such work is necessary to permit the full evaluation of environmental impacts and to permit the consideration of appropriate mitigation measures, e.g., impacts to wetlands, section 4(f) areas and resources covered by section 106 of the National Historic Preservation Act (section 106). The regulation provides for those situations by allowing the applicant to complete all necessary design work needed to complete the EIS or to comply with other environmental laws during the NEPA process. This should not be construed as an authorization to proceed with final design for the entire project, but only for those aspects of the project necessary to consider specific environmental concerns.

The possibility of acquisition of land for a project before completion of the NEPA process was raised by several commenters. The UMTA received comments in

favor of both expanding and restricting the scope of advance land acquisition allowed under the regulation. Several commenters suggested that UMTA expand the scope of advance land acquisition because the Surface Transportation Assistance Act of 1982 (STAA) amended section 3(a)(1)(A) of the UMT Act by adding a provision specifically addressing UMTA's discretion to make grants or loans for the acquisition of rights-of-way and relocation for fixed guideway corridor development for projects in advanced stages of alternatives analysis or preliminary engineering. On the other hand, one commenter expressed the opinion that "no acquisition should be allowed prior to completion of the NEPA, process," arguing that hardship or protective buying cannot be accomplished without influencing or limiting the choice of reasonable alternatives.

In weighing the arguments, UMTA considered how to implement the STAA amendment consistently with the agency's responsibilities under NEPA and with the results of pertinent case law governing advance land acquisition. National Wildlife Federation vs. Snow, 561 F.2d 227 (D.C. 1976). The UMTA has concluded, in light of these considerations and a review of the pertinent legislative history, that this amendment was not intended to override the requirements of NEPA.

For UMTA's major fixed guideway projects, the draft and final EISs are developed during alternatives analysis and preliminary engineering. Any authorization for advance land acquisition during alternatives analysis or preliminary engineering would create a conflict with NEPA if the acquisition could result in a substantial commitment to a particular course of action before the NEPA process was completed. In addition, since UMTA's major investment procedures are integrated with the NEPA process, this would also prejudice the major investment decisionmaking process.

After careful review, FHWA and UMTA still believe

that some advance land acquisition may take place on a case-by-case basis without resulting in a substantial commitment to a particular course of action before completion of the NEPA process. Therefore, in this regulation, FHWA and UMTA are maintaining the current practice: that is, the only types of advance land acquisition that FHWA and UMTA will approve before the completion of the NEPA process are "hardship" and "protective" acquisitions. These terms are defined in § 771.117(d)(12) of this regulation.

As in the past, this type of land acquisition is reserved for extraordinary or emergency situations involving a particular parcel or a limited number of parcels within the proposed transportation corridor. It has been FHWA's and UMTA's recent experience that the number of hardships and protective acquisitions on a given project are so few as to not result in a substantial commitment to a particular course of action. The purpose of protective acquisition is to preserve the status quo. Since it serves to protect valuable property and can be easily undone, such acquisition generally will not tilt the balance toward a particular alternative.

Another question is whether acquiring an option to purchase land before completing the environmental process would be an acceptable alternative to assure the availability of land for project purposes. It would be less costly and arguably would constitute a smaller commitment than the actual purchase of land. Generally, UMTA and FHWA maintain that acquiring options to purchase land for a project would tend to bias fair consideration of other project alternatives and violate basic principles of Federal environmental law. Therefore, the same standards apply to options to purchase as to outright purchase of land: before completing the environmental process, only acquisitions for hardship and protective purposes are acceptable.

To obtain approval for hardship or protective acquisition, the applicant should apply for a CE under

paragraph 771.117(d)(12). In addition, for FHWA actions, hardship and protective acquisition activities must be processed in accordance with 23 CFR 712.204(d). It should be noted that a CE for advance land acquisition applies only to the purchase of property and does not permit further project development. The restrictions of paragraph 771.113(a) will apply until the Administration completes the NEPA process for the entire proposed action. The FHWA has issued guidelines and UMTA is preparing similar guidance describing the documentation needed to support requests for hardship and protective buying. Documentation supporting these claims will continue to be reviewed in the field offices of FHWA and UMTA.

One commenter suggested that any advance land acquisition be noted in the subsequent EIS or EA. The FHWA and UMTA have no objection to noting this information in environmental documents, but do not believe it is appropriate to require it under the regulation.

Paragraph (a)(3) has been added to emphasize that in addition to environmental requirements, certain programming requirements must be satisfied prior to the initiation of FHWA funded final design, acquisition, and construction activities. This paragraph is a cross reference to 23 CFR Part 450 and 23 CFR Part 630 and does not create any additional requirements.

Paragraph (b) has been revised to indicate that FHWA approval of the final environmental document is considered acceptance of the general project location and project concepts such as type of facility, interchange locations, and other major features which may be indicated in the environmental document. This paragraph is an indication that FHWA normally will approve for Federal funding a project of the type noted in the final environmental document. However, it does not commit the Administration to fund any specific project or any features identified therein. Final approval of

the EIS does not constitute a commitment to fund the project, as noted in this paragraph and in § 771.125(e) of this regulation.

Supreme Court, U.S.
FILED
APR 28 1992
OFFICE OF THE CLERK

(2)

No. 91-1603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SAVE BARTON CREEK ASSOCIATION, INC.,
WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,
Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, TEXAS STATE
DEPARTMENT OF TRANSPORTATION, and
MOPAC SOUTH TRANSPORTATION CORPORATION,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF OF RESPONDENT MOPAC SOUTH TRANSPORTATION CORPORATION IN OPPOSITION

J.B. RUHL
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether two state roadways, which are being constructed entirely with state funds and without any federal supervision, authorization, commitment, or control, are subject to federal environmental review under the National Environmental Policy Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1603

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,
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v.

FEDERAL HIGHWAY ADMINISTRATION, TEXAS STATE DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT MOPAC SOUTH TRANSPORTATION CORPORATION IN OPPOSITION

STATEMENT

Petitioners seek to enjoin the construction of two Texas state roadways, designated MoPac South and Segment 3, on the theory that the construction constitutes a "major Federal action" under section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), and thus cannot be undertaken until an environmental impact statement has been prepared. It is undisputed that the planning and construction of the

two roadways were undertaken "by state authorities without substantive federal supervision, authorization, commitment, or control, and will never be subject to review or approval by a federal agency." Pet. App. 32. The district court nonetheless reasoned that because these state funded roadways will connect with existing and proposed federally funded roadways, the state roadways should be treated as integral parts of a "major Federal action."

The Fifth Circuit reversed, explaining that the district court's "ruling when placed in its context would mean that every time a state or local government desires to build a non-federal aid highway project . . . that connects to existing federal highways . . . , the project would be subject to NEPA because it would be 'dependent' on the federal facilities." Pet. App. 28. As the court of appeals noted, its own earlier decisions, as well as those of other circuits, reject such an expansive application of NEPA. *Id.* at 28-29.

The Fifth Circuit also rejected the district court's view that preliminary contacts between the state and the Federal Highway Administration ("FHWA") concerning the two roadways were sufficient as a matter of law to trigger NEPA's requirements. The court of appeals noted that those contacts had been made merely to preserve the option of federal funding—an option the state subsequently chose not to exercise—and it is well established that "the possibility of federal funding in the future for a project or group of projects does not make that project or projects 'major Federal action' during the planning stage." Pet. App. 13, quoting *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979).

In short, the Fifth Circuit recognized that this is a case in which "[t]he state is simply building some highways for its own use," Pet. App. 13, "and concluded that the

use of state funds would enable it to proceed without the delays and expenses associated with compliance with federal environmental law." *Id.* at 32. Because the federal government possesses "no control, right to control, or even the prerogative to suggest compliance with federal standards," *id.*, the court of appeals held that the two roadways "are state projects not subject to the requirements of NEPA." *Id.* at 33.

ARGUMENT

The decision below represents a routine application of the well-established rule that states are entitled to build their own roads with their own funds without having to submit to federal environmental review under NEPA. That decision unquestionably is correct, and there is no conflict among the circuits or any other reason why this Court should undertake plenary review.

Indeed, petitioners do not even challenge the Fifth Circuit's holding on the central legal issue of how NEPA should be construed and applied. They seek review because the court of appeals allegedly "usurped the fact-finding role our system rightly assigns to the trial court and . . . failed to exercise the primary responsibility of appellate courts: the enunciation or clarification of legal doctrine." Pet. 5. These case-specific quibbles, even if arguably justified, would not satisfy the standards for certiorari. *See* Sup.Ct.R. 10.1. But petitioners' complaints are not justified. The Fifth Circuit properly respected the trial court's role as finder of fact, and it adequately and fully explained its legal reasoning.

I. THE FIFTH CIRCUIT DID NOT USURP THE DISTRICT COURT'S ROLE AS FINDER OF FACT

Petitioners' allegation that the Fifth Circuit disregarded the standard of review prescribed by F.R.Civ.P. 52(a), and thus "usurped the fact-finding role," rests on a fundamental misreading of the nature of the issue decided by the district court. When the district court

held the two state roadways to be integral parts of a proposed "major Federal action," the court was not making a finding of fact that could be reversed only if clearly erroneous. That holding was, instead, a legal conclusion that the district court reached by applying the regulatory terms "proposal" and "integral parts" to essentially uncontested facts. The Fifth Circuit was entitled to review that legal conclusion and to reverse for legal error. That is all it did.

The environmental review requirements of section 102(2)(C) of NEPA apply only to "*proposals* for . . . major Federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added). The Counsel on Environmental Quality ("CEQ") has described a "proposal" as "that stage in the development of an action when [a federal] agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23 (1991). FHWA further has determined that "[i]f an action in question is an *integral part* of a larger project which is the subject of an [NEPA] environmental document, that action cannot be 'segmented' from the overall *proposal* and funded separately before the environmental process is completed." 52 Fed. Reg. 32,649 (1987) (emphasis added).

The issue before the lower courts was whether, within the meaning of NEPA and CEQ's and FHWA's rules, there had been a "proposal" for a "major Federal action" of which MoPac South and Segment 3 were "integral parts." In deciding this issue, the Fifth Circuit did not challenge or disagree with the trial court's factual findings, only with the legal conclusions the trial court based upon those findings. As the Fifth Circuit explained, "[t]he district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an *erroneous legal conclusion* that the Austin Outer Loop constitutes

a 'proposal for major Federal action' subject [to] an environmental document." Pet. App. 9 (emphasis added); *see also* Pet. App. 20 ("the error of the district court lies in concluding that these two highway projects are an integral part of an Austin Outer Loop").

In short, the district court had misunderstood the proper scope and application of the pertinent statutory and regulatory terms, and the Fifth Circuit corrected that misunderstanding. Nowhere in its opinion did the Fifth Circuit overstep the bounds of proper appellate review. "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

Where, as here, the issue is whether or how a statutory or regulatory term applies to largely uncontested facts, the issue properly is treated as one of law. For example, when a tax statute permits the deduction of "ordinary and necessary" expenses, the "[d]etermination of whether the . . . expenses are 'ordinary and necessary' requires conclusions from undisputed facts . . . [and] [t]he clearly erroneous standard does not apply." *Colorado Springs National Bank v. United States*, 505 F.2d 1185, 1189 (10th Cir. 1974). *See also, e.g., Wirtz v. Barnes Grocer Co.*, 398 F.2d 718, 722 (8th Cir. 1968) (applying the term "enterprise"). This case is the same. What constitutes a "proposal" or an "integral part" within the meaning of CEQ's and FHWA's regulations is importantly a question of law rather than of fact. And where, as here, "the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n. 15 (1982); *see also, Bose Corp.*, 466 U.S. at 501 n.17; *Pullman-Standard v. Swint*, 456 U.S. 273

(1982); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n. 9 (1963).

II. THE COURT OF APPEALS CLEARLY ENUNCIATED ITS CONCLUSIONS OF LAW

The Fifth Circuit explained its legal conclusions in an unusually lengthy and carefully written opinion. Petitioners' complaints on that score are frivolous.

In the section of its opinion captioned "Major Federal Action," Pet. App. 9-21, the Fifth Circuit began with the legal principle that "the touchstone of 'major Federal action' constitutes a federal agency's authority to influence nonfederal activity." *Id.* at 11. The court then reviewed the undisputed record evidence and found no evidence of such federal authority in this case. *Id.* at 12-14. The court next analyzed the legal requirements for a "proposal," relying on the CEQ's construction of that term. *Id.* at 14 n.9 (citing 40 C.F.R. § 1508.23 (1991)). After explaining that "the district court incorrectly elevated FHWA's early coordination process to the status of 'proposal' under NEPA," *id.* at 15, the court concluded that "[s]ince the FHWA has at this time given no approvals —whether it be approval of a final EIS, approval of design, approval of location, or approval of funding—there has been no 'major Federal action' in connection with any segment of the Austin Outer Loop. The 'federal imprimatur' that sometimes attaches to state projects is simply not present in this case." *Id.* at 18. In support of this conclusion, the court supplied extensive citation to and analysis of other legal precedents, all of which were consistent with its ruling. *Id.* at 18-21.

Similarly, in the section of its opinion captioned "Segmentation," Pet. App. 21-32, the court reviewed the extensive body of case law addressing the meaning of the term "integral part" and then concisely summarized the applicable doctrine which it had first announced over ten years ago:

> "Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. This claim is a major part of the charge made by plaintiffs in this case. "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. Unit B 1981). Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.

Id. at 23-24. The legal criteria stated by the court are exactly those promulgated by FHWA. *See* 23 C.F.R. § 771.111(f) (1991).

The Fifth Circuit then examined those four "integral part" criteria in detail for Segment 3 and MoPac South based on the undisputed record evidence, Pet. App. 25-32, and summarized its conclusion thusly:

> We have addressed the central question in the challenge of improper segmentation—whether Segment 3 and MoPac South serve significant purposes and have the requisite independent utility. The record clearly indicates that the two projects serve such purposes and are sufficiently independent even in the absence of MoPac, U.S. 290, and the Austin Outer Loop. This Court finds that both Segment 3 and MoPac South would meet the elements enumerated in *Piedmont Heights* to fall outside of NEPA's purview.

Id. at 30. That conclusion was both clear and correct.

Petitioners' professed inability to glean legal doctrine from the Fifth Circuit's opinion results not from any lack of enunciation or clarity by the court but rather

from petitioners' stubborn refusal to accept NEPA for what it is—a statute with clearly-defined limits. The plain fact is that "[a]lthough desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." Pet. App. 20 (*quoting* McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex. L. Rev. 801, 837 (1977)). The Fifth Circuit did no more than recognize and apply that home truth, and its decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 91-1603

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, and AUSTIN CROSSROADS, INC.,
Petitioners,

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,
Respondents.

RESPONSE OF THE TEXAS DEPARTMENT OF TRANSPORTATION TO THE APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

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Questions Presented for Review

(1) Did the Fifth Circuit Court of Appeals correctly determine that the projects in issue were not "proposals for major federal action" and not within the scope of federal NEPA requirements.

(2) Is the Fifth Circuit Court of Appeal's finding that no "proposal for major federal action" an ultimate fact limited by the "clearly erroneous" rule of Rule 52(a) in view of the extensive stipulations of fact found in the record.

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Concise Statement of the Jurisdictional Grounds

The judgment of the court of appeals was entered on *January 17*, 1992. A petition for rehearing was denied on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statutory and Regulatory Provisions Germane to the Case

23 U.S.C. 145 provides in whole as follows:

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

Rule 52(a), Fed.R.Civ.Proc.(1991)

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necsssary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions or motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) **Amendment.** * * *

A Concise Statement of the Case

The statement of this case is best recited by the Fifth Circuit Court of Appeals at 950 F.2d at pp. 1130-1132. Petitioners' Appendix ("Pet.App") 2-6. This Respondent relies upon the appellate court's recitation of the factual context of this matter now before this Honorable Court.

This case grew out of an attempt by Petitioners to impress upon a State project federal law which, by the rules enunciated by the courts of this land, was not applicable.

The trial court, believing as it did, that the word "proposal" incorporated within its meaning planning and minimal contacts with FHWA, enjoined the project by reasoning that "the probability of a request for federal funding is too great to allow SDHPT to construct one portion of the loop without following federal law". The Court of Appeals found that even this legal reasoning by the trial court was flawed. Pet. App. 17.

This case is very fact-intensive revealing those matters involved in this lawsuit which, basically, are not really in dispute. The erroneous conclusions of law that were drawn from those facts by the trial court materialized the very foundation of the appellate court's resolution of this matter and now are disp ositive of the Petitioner's Application for Certiorari. The Petitioners, who were Plaintiffs in the trial court, stipulated to in excess of 250 stipulations of fact which in large part constituted the whole of the evidence in this matter. There were at least 267 exhibits entered into evidence and listed in the pretrial order before the trial court. Pet. App. 4. The witnesses contradicted none of the stipulations of fact or the exhibits entered at trial. Pet.App. 13.

The Petitioners have failed to acknowledge their own reliance upon the voluminous stipulations of fact and law that was entered in the trial court. It was these stipulations of

fact that constituted the greater part of the conclusive evidence before the trial court and it was these facts that were so vitally important that distinguished this case from those so heavily relied upon by Petitioners.

Argument as to Major Federal Action

The Fifth Circuit Court's decision in this matter is consistent with sound and well settled public policy and is in accord with the pronouncements of law by this Honorable Court. There is no diversity of law between the various circuit courts of this land. The Court of Appeals correctly pointed to the opulent resolution of all evidence derived from the voluminous facts in this case by saying that "[t]he extensive record on appeal, however, fails to show any evidence of any significant federal involvement, much less 'massive' involvement." Pet.App. 12.

The principle, recognized by the appellate court, is that Federal control is the measuring stick by which to judge the imposition of federal guidelines on state projects and to impress upon them the federal requirements of NEPA and other federal statutes. This Court spoke on this subject in *Pennhurst State School and Hospital v. Halderman*, (1981) 101 S.Ct. 1531, 1546, 451 U.S. 1, 67 L.Ed.2d 694. Justice Rehnquist, writing for the majority, said at p. 1546 that "the State [has] alternative choices of assuming the additional cost of complying with federal standards or not using federal funds." Likewise, in the instant case, much like *Pennhurst*, the State chose not to use any federal funds nor, as the appellate court has said, subject the projects to any federal involvement. Pet.App. 17.

The Court of Appeals also correctly recognized that established body of law that holds that NEPA and federal environmental regulations do not apply to state or local actions. *Citizens for Balanced Environ. & Transp., Inc. v. Volpe*, 376 F.Supp. 806 (D.Conn. 1974), aff'd, 503 F.2d 601 (2nd Cir. 1974). Pet. App. 12. This is the catapult, as the appellate court

has proclaimed, that is the launching point for imposing federal criteria on state projects, for without major federal action -- that is federal project -- there can be no consideration of the Petitioners' grievances. 23 C.F.R. 771.9(d)). See *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977); *Sworob v. Harris*, 451 F.Supp. 96(E. D. Pa. 1978), *aff'd*, 578 F.2d 1376 (3rd Cir. 1978), cert. denied, 439 U.S. 1089 (1979). Pet. App. 11-12.

The Court of Appeals has aptly compared and distinguished the factual context of this case to those rules and legal doctrines laid down in instances such as *Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 489-490 (7th Cir. 1977), *aff'd*, 418 F.Supp. 296 (1976), cert. denied, 434 U.S. 1008 (1978), where federal participation in programming, location, design, preliminary engineering, and right-of-way acquisition in a project does often lead to a conclusion that the project might be a "major federal action." However, as conclusively shown in the case before this Court, where all the evidence conclusively showed that no federal funds were used in any part of the project, it is not a proposal for "major Federal action". *Citizens for Balanced Environ. & Transp., Inc.*, 503 F.2d at 602. Pet. App. 13. The Court of Appeals additionally clearly distinguished those cases relied upon by Petitioners, such as *Named Individual Members of San Antonio Conservation Society v. Texas Hwy Dept.*, 496 F.2d 1017, 1022 (5th Cir. 1074), cert. denied, 420 U.S. 926 (1975). Note however that the Court rightfully addressed the significance of the facts of this case in view of the influence of *Hawthorn Environmental Preservation Ass'n v. Coleman*, 417 F.Supp. 1091, 1101 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977), and its lack of application to the facts of this case. Pet. App. 18. The control of the Federal government in a project (or lack of control) was particularly important where an Act of Congress terminated federal funding for freeway construction, and the legal effect was that the project was exempted from the environmental requirements of federal law. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971) cert.denied, 406 U.S. 933, 92

S.Ct. 1775, 32 L.Ed.2d 136. See also *Macht v. Skinner*, 715 F.Supp. 1131, 1134 (D.D.C. 1989), *aff'd*, 889 F.2d 291 (DC. 1989); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990). Pet App. 18-20. Many of the authorities cited in this Response to Petitioners Application for Writ of Certiorari are circuit court cases in which this Honorable Court has denied certiorari. This application for certiorari should likewise be denied.

The evidence demonstrates, as is noted by the Court of Appeals, that there was no showing of anything other than a possibility of future federal funding. It is settled and accepted by the courts of this land that NEPA's environmental impact statement requirement cannot apply to these state projects, on which no federal action has yet been proposed. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U. S. 927 (1976); *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va. 1973), *aff'd*, 481 F.2d 1288 (4th Cir. 1973). Pet. App. 17.

The ruling of the Fifth Circuit Court of Appeals does not depart from those rules of law established by this Court that have been applied to factual situation such as this case. The appellate court properly held, as a matter of law, that the projects in issue were not Federal projects and not subject to the requirements of NEPA. Petitioners Application for Writ of Certiorari on this point should be denied.

Argument as to Rule 52(a)

The remaining question presented is primarily evidenciary. The substance of the Petitioners' argument is stated in the opinion of the Court of Appeals. The appellate court held

all the stipulations to be relevant.[1] "Pet. App. 4. With the proposition of Petitioner's arguments relative to the stipulations of fact dispensed with, the finding of the trial court then, that the projects were a "proposal for major federal action", was a finding of law which, the Court of Appeals was free to review and reach its own conclusions "untrammeled by the district court's findings and conclusions of law". Pet App. 4. See also, *Wiggington v. Order of United Commercial Travelers of America*, 126 F.2d 659, 661 (7th Cir. 1942); *Fargo Glass & Paint Co. v. Globe American Corp.* 201 F.2d 534, 536, cert. denied 73 S.Ct 833, 345 U.S. 942, 97 L.Ed 1368.

In *Wirtz v. Barnes Grocer Company*, 398 F.2d 718, 722 (8th Cir. 1968) the court dealt with the question of what constitutes a business enterprise under the Fair Labor Standards Act of 1938, 3(r),(s)(1), 29 U.S.C.A. 203(r),(s)(1) and said such is a question of law and the "clearly erroneous" rule does not apply. Likewise, it seems to be a correct application of law that

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[1] "[p]rior to the bench trial, the parties filed a proposed agreed pretrial order containing extensive stipulations of facts. On appeal, a controversy ensued concerning the stipulations. The stipulations on record are divided into three groups; stipulations #1-50, stipulations #61-63, and stipulations #64-299. The appellees assert that the district court did not accept the proposed pretrial order for stipulation #61-299, and thus, the stipulations are largely moot. In essence, according to appellees, this Court need not expend its efforts examining the proposed stipulations. In contrast, the appellants contend that, while the district court did not sign the pretrial order, it was duly filed and entered. Furthermore, the district court's memorandum opinion and order was based on the testimony and evidence presented and upon consideration of the arguments of counsel; that body of record evidence included numerous references to the parties' stipulations. Additionally, throughout the bench trial, the district court permitted counsel freely to refer to the stipulations. At no point before, during, or after the trial did the district court state or imply that it would not accept the stipulations generally or had rejected them specifically. Ultimately, according to appellants, the appellees have demonstrated no good reason to depart from the accepted rule that matters which are stipulated in the pretrial order are binding upon the parties, absent some modification, and usually cannot be pursued on appeal. Our review of the record also indicated that the appellees themselves utilized the same stipulations they asserted should be rendered largely moot. Consequently, this Court has applied all stipulations as relevant."

the question of "proposal for major federal action" is a question of law and not subject to the "clearly erroneous" rule of 52(a). The Court in *Wirtz* said at p. 722:

> Appellees urge that under Rule 52(a) due regard be given to the opportunity of the trial judge to judge the credibility of the witnesses and that we should not set aside findings of fact unless clearly erroneous. This is not the type of situation the rule was intended to cover. Credibility is not in issue. *In issue are the conclusions of law as to what constitutes an enterprise and whether under the undisputed facts, an enterprise as defined by the Act, was shown.* (emphasis added)

As in *Wirtz*, supra, here is an instance where credibility of the witnesses is not in question. It is the interpretation of their testimony that is to be given import. The Court of Appeals is in as good a position as the trial court to determine what law is applicable to the evidence, and if, taken as a whole, whether it constitutes a "proposal for major action" or not. This Court recited what is and should be the rule of this case. In *United States v. United States Gypsum Co.*, (1948) 333 U.S. 364, 68 S.Ct 525, 542, 92 Led. 746, this court said that "[t]he practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The finding is 'clearly erroneous' when although there is evidence to support it, if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". The Fifth Circuit Court of Appeals has followed *United States Gypsum Co.*, supra, reasoning in *Jones v. Diamond*, 394 F.2d 997, 1010, (5th Cir. 1979) by holding that "findings of fact are, of course, to be reviewed under the mandate of Rule 52(a), Federal Rules of Civil Procedure. They are not to be set aside unless clearly erroneous. As this rule has

been construed, *the trial court's findings of fact may be denominated clearly erroneous* only *when the 'reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made*'". (emphases added). The Court of Appeals found error in the trial court's application of the prevalent law by saying, "We recognize that 'major Federal action' can exist when the primary actors are not federal agencies. *Nonetheless, the district court appears to have placed undue reliance on only a portion of the CEQ's regulation by focusing solely on the 'potentially subject' factor while dismissing with seeming facility the "Federal control and responsibility' factor*. (emphasis added). "[T]he distinguishing feature of 'federal involvement' is the ability to influence or control the outcome in material respects." Pet App. 20. The trial court missed completely the correct import of this regulatory provision. It was not error for the appellate court to review the entire record and form a definite and firm conviction that a mistake had been committed. Pet. App. 15, 20.

Finally, the Petitioners reliance on *Pullman-Standard v. Swint*, 102 S.Ct. 1781, 456 U.S. 273, 72 L.Ed.2d 66 (1982) is incorrect because the appellate court applied the correct law to the totality of facts in this case. *Pullman-Standard* is a correct restatement of the "clearly erroneous" rule of 52(a), however, the trial court in the present case did not correctly apply the prevailing law applicable to the factual context of the case before it. Pet. App. 11, 32. Consequently, the ruling of the Fifth Circuit Court of Appeals in this case does no violence to Rule 52(a) but is a correct application of the prevailing law to the totality of facts developed in the trial court. Here, as in *United States v. United States Gypsum Co.*, supra, the appellate court has merely concluded that the law applied to the factual findings of the trial court was clearly wrong because, in reviewing this matter on the entire evidence, the Court obviously was left with the definite and firm conviction that a mistake had been committed. Id. at p. 542. e.g. Pet. App. 32.

This Court has repeatedly held that its job is not to correct factual errors committed in courts below. This Court denied certiorari in *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie, Etc.*, 663 F.2d 1338, 1341 (5th Cir. 1981) cert. denied 102 S.Ct. 1104, in an instance where the Court noted at p. 1431 that: "[i]n our review of the District Court's judgment, we are bound under F.R.Civ.P. 52(a) to accept its findings of fact unless 'clearly erroneous". See 5A *Moore's Federal Practice* Sec. 52.08. "Findings are 'clearly erroneous' in this Circuit where such findings are without substantial evidence to support them, where the District Court misapprehended the effect of the evidence, and if the force and effect of testimony considered as a whole disclosed that the finding is so against the great preponderance of the credible testimony that it does not reflect the truth of the case." (citations omitted). There is no underlying justification for this Court to expend any fruitless effort by granting certiorari in this case based upon Petitioner's argument that the appellate court, in some way, violated the spirit or meaning of F.R.Civ.P Rule 52(a).

CONCLUSIONS

This case does not merit review by this Honorable Court by way of Certiorari. There are no novel procedural or constitutional questions presented here nor is there any aberrance of law between the circuit courts of this country; only the clear, concise and declarative principles enunciated by the wisdom of the courts of our land. This Respondent moves the Court to deny the Application for Writ of Certiorari presented by Petitioners in this matter.

Respectively submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response of the Texas Department of Transportation was served in compliance with Rule 5 of the Federal Rules of Civil Procedure by certified mail, return receipt requested on this the 29 day of April, 1992.

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(4)

No. 91-1603

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAVE BARTON CREEK ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether two state roadway projects are subject to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-33) is reported at 950 F.2d 1129. The memorandum opinion of the district court (Pet. App. 35-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1992. A petition for rehearing was denied on February 24, 1992 (Pet. App. 69-70). The petition for a writ of certiorari was filed on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a suit by local environmental organizations to prevent construction of two highway projects, MoPac South and Segment 3, in the area of Austin, Texas, for failure to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Basing its decision principally on the parties' extensive stipulations of fact, see Pet. App. 4, the district court ruled for petitioners and enjoined further construction on the highways. The court of appeals reversed and dissolved the injunction, holding that (1) the two highway projects were not "major Federal action[s]" requiring the preparation of an environmental impact statement (EIS) under NEPA and (2) the evidence failed to establish that the projects were improperly segmented from a contemplated beltway project around Austin, called the Austin Outer Loop (Loop).

1. MoPac South and Segment 3 are two roadways planned and now partially constructed in the Austin area. MoPac South is a 5.5-mile southern extension of a completed 16-mile north-south freeway located in West Austin known as the MoPac (so-called because it uses a right-of-way of the Missouri Pacific Railway). Its northern terminus is U.S. 290; its southern terminus is Segment 3. Pet. App. 37-38. Segment 3 is a section of a contemplated 84-mile beltway around the city, known as the Austin Outer Loop. *Ibid.*

Before the district court, the parties stipulated that the Federal Highway Administration (FHWA) had not committed funds or reimbursed the Texas Department of Transportation (the State) for planning, right-of-way acquisition, or development of any

segment of the Austin Outer Loop, and that the State had not requested funding for construction of any segment of the Loop. MoPac C.A. R.E. 85.* The parties also stipulated that FHWA has not approved the location of any segment of the Austin Outer Loop, and that, in 1988, the FHWA informed the State that the Austin Outer Loop was ineligible for federal funding. *Id.* at 93-94. The parties further stipulated that partial construction on MoPac South had proceeded up to that point without any federal funding, and that MoPac South was currently ineligible for federal funding. *Id.* at 94.

2. In July 1989, petitioners filed a complaint and a motion for a preliminary injunction alleging that respondents had violated NEPA by failing to prepare, or to require the preparation of, an EIS on MoPac South, Segment 3, or the Austin Outer Loop. Petitioners alleged, *inter alia*, that the non-federal respondents acted to evade the requirements of NEPA by improperly segmenting the state highway projects and using only state funds to construct environmentally sensitive segments traversing the Austin-area Edwards Aquifer. See Pet. App. 38. Petitioners argued that the Austin Outer Loop and MoPac South were "proposals" for "major Federal action" requiring the preparation of a comprehensive EIS under NEPA.

3. After a bench trial, the district court ruled that MoPac South and Segment 3 were subject to NEPA requirements. The court enjoined further construction of those projects pending compliance with the statute. Pet. App. 61. The district court's

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* MoPac C.A. R.E. refers to the Record Excerpts filed by respondent MoPac South Transportation Corporation in the court of appeals.

injunction rested on the legal conclusions that MoPac South and Segment 3 were integral parts of the Proposed Austin Outer Loop, and that the Austin Outer Loop Project as a whole was a "major Federal action." *Id.* at 51.

4. In reversing, the court of appeals rejected the district court's conclusion that MoPac South and Segment 3 constituted "proposal[s]" for "major Federal action" triggering the requirements of NEPA. The court observed that, because there had been no final, formal plan presented to the FHWA for approval, neither MoPac South nor Segment 3 had "yet acquired the status of a formal proposal requiring federal approval." Pet. App. 15. The court also considered a Council on Environmental Quality (CEQ) regulation defining "major Federal Action" as an action by nonfederal actors "which [is] potentially subject to Federal control and responsibility." *Id.* at 11, citing 40 C.F.R. 1508.18 (1991). The court noted (Pet. App. 12-13) that the potential for federal control and involvement in the projects at issue was minimal, observing that work on Segment 3 and MoPac South had

> progressed * * * to construction without FHWA approval or funding. Furthermore, state and local funding of these projects can never be reimbursed by the FHWA because the state did not obtain prior authorization from the FHWA * * * before awarding the construction contracts. * * * The state is simply building some highways for its own use.

The court concluded that, because "[t]he record is silent with regard to any meaningful federal participation or control exercised over the [projects] in this case," *id.* at 18, the projects "[did] not constitute nor are they a[] part of any project constituting 'major

Federal action' within the contemplation of [NEPA]." *Id.* at 21.

The court also ruled that the evidence failed to establish that the projects were improperly segmented from the contemplated Austin Outer Loop project. The court first noted that, since the highways in question were not part of any formal "proposal" for "major Federal action," Pet. App. 22-23, their segmentation could not constitute an improper attempt to avoid the requirements of NEPA. *Id.* at 24-25. In any event, the court decided, both MoPac South and Segment 3 met the four factor test for evaluating improper segmentation as set forth in the CEQ regulations implementing NEPA and adopted by the FHWA. Pet. App. 23-24 & n.15. The court determined that both highways at issue had "logical termini," possessed "substantial independent utility," and left open alternatives for construction and alignment of other segments of the larger project. *Id.* at 27-29. The court concluded that improper segmentation had not occurred. *Id.* at 30.

ARGUMENT

This case concerns the application to particular facts of well-established standards for whether a project triggers the requirements of NEPA. The court of appeals' resolution of the issue is consistent with the decisions of this Court and other courts of appeals, and does not merit this Court's review.

1. Petitioners do not directly challenge the court of appeals' conclusion that NEPA requirements do not apply to the highway projects at issue. Rather, petitioners' primary contention (Pet. 5-11, 14-20) is that, in rejecting the district court's conclusion that the projects are covered by NEPA, the Fifth Circuit usurped the district court's fact-finding role.

That contention is without merit. The question whether the highway projects are subject to the requirements of NEPA depends on whether, under the statute and pertinent regulations, the projects qualified as "proposal[s]," constituted "major Federal action," or were improperly segmented. These are questions of law. Here, the court of appeals concluded that the district court misapplied the legal standard for deciding whether NEPA requirements were triggered on the facts of this case. See Pet. App. 9 ("The district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an erroneous legal conclusion that the Austin Outer Loop constitutes a 'proposal for major federal action.' "). The court of appeals' review of the district court's resolution of the legal issues did not require it to make any findings of fact. Indeed, there was no controversy as to the key facts found by the district court and stipulated by the parties. Clearly, the court of appeals' reliance upon the parties' stipulations of fact "d[id] not preclude [it] from making an independent determination as to the legal conclusions and inferences which should be drawn from them." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). In correcting the district court's erroneous application of the law to the facts, therefore, the court properly carried out its appellate function. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

2. Petitioners also err in suggesting (Pet. 12-16) that the Fifth Circuit failed to articulate clear legal standards for deciding when NEPA covers state-initiated projects. In rejecting the district court's finding that the projects in question were "proposal[s]" for "major Federal action," the court of appeals noted that "[c]ases finding 'federal' action emphasize authority to exercise discretion over out-

come." The court stated that "[t]he distinguishing feature" of federal action is the ability of a federal entity "to influence or control the [project's] outcome in material respects." Pet. App. 11 (quoting W. Rodgers, *Environmental Law* § 7.6, at 763 (1977)). The court concluded that, because the FHWA had little or no control over the projects at issue, those projects were not "major Federal action[s]." Likewise, in considering whether MoPac South and Segment 3 had been improperly segmented from the larger Austin Outer Loop project, the court applied the four factor test articulated in the pertinent CEQ regulation. After carefully analyzing the facts in the record as to each highway, the court concluded that the projects met all criteria for permissible segmentation and could therefore proceed without compliance with the requirements of NEPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(5)

No. 91-1603

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO OPPOSITIONS

to Petition for Writ of Certiorari

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Reply to Opposition Arguments

Respondents are counting on this Court's caseload being so heavy neither the Justices nor their briefing attorneys will have time to recognize the opportunity this petition offers the Court. Please show them to be wrong on this score.

Regarding the question of fact/question of law dichotomy:

It is, almost exclusively, Petitioners' first claim of "certworthiness" for this case that Respondents attack. Petitioners' first claim is that the case offers the Court an opportunity to elaborate on the theory behind the text of Rule 52(A) and, thereby, to realize more consistent appellate deference to trial court fact findings. To obscure the fact of this opportunity, Respondents by and large resort, first, to semantics (characterizing the court of appeals's findings as "legal conclusions" to which Rule 52(a) has no application) and, second, to exaggeration about exactly how uncontested the facts are, in the first place.

In evaluating Respondents' core arguments, consider the first as it applies to the question of whether the Austin Outer Loop is a "proposal" for action, be that action federal or otherwise. The district court found the Loop to be a proposal. On the facts, this finding certainly does not seem "clearly erroneous." For example, FHWA had published for the Loop a "Notice of Intent," which by regulatory definition[1] describes "proposed actions" and the text of which had six times characterized the Loop as a "proposed" project, etc.. 52 *Fed. Reg.* 32090 (August 25, 1987), Plaintiffs' trial

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1 40 C.F.R. §1508.22(a) (1991).

exhibit no. 23.

Nonetheless, the court of appeals determined the Loop not to be a proposal. All Respondents claim the "proposal" question is one of law, not even one of mixed fact and law, and so assert the Rule 52(a) stricture does not apply.

However, the Council on Environmental Quality has by regulation[2] provided, "a proposal may exist in *fact* as well as by agency declaration that one exists." Furthermore, this Court's only opinion dealing with what is or is not a "proposal" for NEPA[3] purposes, *Sierra Club v. Kleppe*, 427 U.S. 390, 96 S.Ct. 2718 (1976), relied explicitly on the district court's *finding* there was no "proposal" integrating individual coal development projects. *Id.*, at 400-401 and 2726, respectively. Thus, the inferences one can fairly draw from the analyses to date regarding the "fact" or "legal conclusion" status the "proposal" question just do not support Respondents' bald semantic thrust.

In reality, of course, there is no bright line test for allocating each question of a case into either the "fact" or the "legal conclusion" category. Most often, one must focus on the theory underlying Rule 52(a) in order to correctly apply the rule. In Petitioners's view, Judge Posner's position, harsh though it can be in individual cases, is sound: appellate review should always defer to trial court determinations, except when doing otherwise will promote maintenance of uniform legal doctrine, because the maintenance of uniform

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2 23 C.F.R. § 1508.23 (1991).

3 National Environmental Policy Act, 42 U.S.C. § 4332(C) (1991), principally.

legal doctrine (and not the meting out of "justice" in any particular case) is the preeminent appellate responsibility. *Mucha v. King*, 792 F.2d 602, 606 (7th Cir. 1986)[4].

By granting *certiorari* in this case, this Court gains the opportunity to walk through the rationale of Rule 52(a) and demonstrate its application to three determinations: is the Loop a proposal; if it is, is it a proposal for federal action; and, if (as the district court and Petitioners would have it) each of those determinations is made in the affirmative, is Segment 3 an integral part of the Loop?[5] The middle one of these three determinations also presents the opportunity to again explain the relationship between appellate emphasis on one element (not emphasized by the district court) of a legal definition and impermissible appellate "reweighting" of the evidence. See, *Inwood Laboratories, Inc., v. Ives Laboratory*, 456 U.S. 844, 102 S.Ct. 2182 (1982) (appellate error to reject, because of district court's low emphasis on

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[4] Professor Charles Wright has addressed the "justice in any particular case" question by citation to Chief Justice Ellsworth's observation, "Surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over." Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 780-781 (1957).

[5] Respondent Corporation is the only Respondent that clearly states what the issue before the lower courts actually was. Br. in Opp. 4. The trial court did not hold for Petitioners because it found Segment 3 to itself be a proposal for major federal action; the trial court held for Petitioners because it found Segment 3 to be an integral part of the Austin Outer Loop, which itself was a proposal for major federal action. App. 47 and 50. (The district court's decision on MoPac South had two bases: MoPac South and Segment 3 were in fact one project, and MoPac South lacked substantial utility independent of federal projects to which it would connect. App. 67.)

evidence of mislabeling, the district court's finding regarding the extent of the defendant's knowledge).[6]

Regarding whether the facts were liquidated before trial:

Respondents' second general means of disparaging the "certworthiness" of this case is to contend all its principal facts were uncontested. They make this contention to support their related arguments that (1) credibility of witnesses is not an element of import in this case and (2) the appellate court was in as good a position as was the district court to draw inferences from "basic" facts.

All facts are not uncontested. Parties just do not spend four days in trial (three on the merits and one on the preliminary injunction), if all the facts are liquidated.

Petitioners rebutted, at pages 17 and 18 of their Petition, the argument the appellate court was in as good a position as was the district court to draw inferences from the allegedly liquidated basic facts. Furthermore, this Court has voiced twice in the past decade its directive that appellate courts should not draw factual inferences, but should remand to the district court for its more practiced execution of that task. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982), at 291 and 1791, respectively, and *Icicle Seafood v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527 (1986), at 714 and 1530, respectively. See, also, Lee, *Principled Decision Making and the Proper Role of the Federal Appellate Courts: The Mixed Questions Conflict*, 64

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6 In the case at bar, the appellate court rejected the district court's finding the Loop is a proposal for "federal" action, because the appellate court felt the district court placed undue emphasis on prospective, rather than past or present, federal control.

S. Cal. L. Rev. 235 (1991), at 261-266.

As to the significance of the credibility of the witnesses, please consider, by way of example, the appellate court's finding "the outer loop does not exist except in speculative plans for years ahead."[7] App. 21. This finding is followed by the supporting evidence, "the federal authorities as well as the state authorities recognize this."

The federal witness that arguably "recognized" this was Peter Lombard, FHWA's regional planning director and only witness. He did not prove to be an analytical witness, and the district court judge was fairly blunt about the value of his testimony:

> WITNESS: May I elaborate on that? We'd look at . . .
>
> JUDGE: No, no, no, no, no. I've heard all of the elaboration I want, thank you.
>
> WITNESS: Okay, sorry.
>
> JUDGE: I think what we have here is the perfect example of a complete bureaucrat, and I am not getting anything of value from this, counsel, so you can wind it up whenever you're ready.

Trial tr. page 521.

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[7] The district court did not even suggest such a finding, and Petitioners certainly contest it.

Two final points, briefly:

Finally, Respondents, to varying degrees and perhaps accidentally, encourage the misconceptions (1) the district court ordered someone to prepare an EIS and (2) no state-funded work may ever be enjoined under NEPA. The former just did not happen, and the latter ignores FHWA's interpretation[8] of its own regulation, 23 U.S.C. § 771.113 (1991), as well as case law (e.g., *Hawthorn Environmental Preservation Assoc. v. Coleman*, 417 F.Supp. 1091 (N.D. Ga. 1976), aff'd *per curiam*, 551 F.2d 1055 (5th Cir.1977)).

Prayer

Nothing Respondents argued effectively undercuts the value of this case as a vehicle by which this Court can force on the intermediate appellate courts more deference in fact for Rule 52(a). (Petitioners' first "question presented for review" sets up this opportunity.) Respondents barely addressed at all the substantive NEPA-law issues raised by this case. (These are set up by Petitioners' second and third "questions presented for review.")

Petitioners in their initial prayer requested issuance of the writ of *certiorari*, and that is still their prayer. Given the demands on this Court's resources, it remains Petitioners' grudging judgment[9] a summary disposition based on the Rule

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8 Set forth at App. 71.

9 Being environmental advocates, Petitioners hate to forego the chance to get a definitive statement of the law regarding, especially, the relevance for NEPA application of thoroughly-proved prospective federal control.

52(a) issues would be the most appropriate course of action. On reflection, however, the extremely succinct language suggested in the Petition prayer now seems inadequate; Petitioners now endorse an opinion that explicitly elaborates on the "doctrinal uniformity" mission of appellate courts.